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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
TERYSA M. WELCH,
PLAINTIFF,
vs. NO: CIV-11-0700 KG/SCY
CITY OF ALBUQUERQUE, a New Mexico
Municipality, et al.,
DEFENDANTS.

TRANSCRIPT OF TRIAL PROCEEDINGS - VOLUME VII

BEFORE THE HONORABLE KENNETH J. GONZALES

TUESDAY, MAY 22, 2018; 8:31 A.M.

ALBUQUERQUE, NEW MEXICO

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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8 BY: MS. PATRICIA WILLIAMS and
MS. LORNA M. WIGGINS

9 Also Present: Ms. Terysa M. Welch
Ms. Trish Hernandez
10 Mr. Trevor Wiggins
Ms. Mary Scott
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1 THE COURT: All right. Good morning, everyone. All
2 right. Please be seated.

3 Okay. Back on the record. By now I think you have
4 the latest, most recent, and as close to final draft of the
5 jury instructions and the verdict form.

6 Let me point to you at least a few of the changes
7 that we made last night after we recessed. First, let me take
8 up the issue about -- that was raised relating to including the
9 transfer from ROP as an action by the City and whether that was
10 raised at any point before, including in the Pretrial Order.
11 That language we've incorporated into the jury instructions,
12 and I'm reflecting back on the Pretrial Order. This is
13 document 422, where it's referred -- or referenced in multiple
14 places, including on page 7. It's subsection capital B, Facts
15 Relevant to Sex Discrimination, and it relates to when the City
16 and her supervisors disciplined her and generally I think
17 referring to what actions the City took. There are specific
18 references to facts relevant to retaliation. That's in
19 subsection C, also on page 7, including language relating to
20 the City retaliated against her by disciplining her and forcing
21 her to transfer out of ROP. Retaliation being relevant to the
22 claim of discrimination. And also on page 8, subsection
23 capital D, Facts Relevant to the HRA Claims, and including
24 language, third line, that reflects transferred her from ROP.

25 So based on those references in the Pretrial Order,

1 noting the objections from defendant, but nevertheless finding
2 it instructive and helpful to the jury to include, based on
3 what's been alleged or claimed, to including those -- those --
4 well, that language in the jury instructions.

5 Ms. Williams, anything as to that argument or that
6 issue?

7 MS. WILLIAMS: Your Honor, if the -- if the transfer
8 is going to be specifically mentioned, we would ask that our
9 proposed adverse employment action that goes directly to
10 transfer should also be included on one of our blank pages. I
11 don't know if that's happened or not.

12 THE COURT: Yes, let me take that up next. So
13 instead of incorporating it into a blank page as a whole
14 separate instruction, let me point you to what you have in
15 front of you in the instructions as Number 11.

16 First, let me just tell you, in the second paragraph,
17 we've inserted, you'll notice, "An employee is free to
18 discipline" -- excuse me -- "An employer is free to discipline
19 or to transfer an employee for any nondiscriminatory reason."
20 So the phrase "or to transfer an employee" was added. It was
21 also added at the end of that same paragraph, last sentence,
22 beginning with the phrase "used in consideration in deciding to
23 discipline her or to transfer her from ROP." So those phrases
24 were added.

25 Let me also call your attention to page 16, the first

1 full paragraph, that is new, and it includes language from the
2 Tenth Circuit. If you need the citation, I can provide that to
3 you. That was offered, though, I think in defendant's proposed
4 jury instructions. I'll just read it to you and into the
5 record.

6 "An involuntary transfer, without more, does not
7 constitute an adverse employment action if it does not involve
8 any significant changes to an employee's conditions of
9 employment. For example, an involuntary transfer does not
10 constitute an adverse employment action if salary and benefits
11 remain the same and duties are substantially the same."

12 Again, that's taken directly from the Tenth Circuit.

13 Now, Ms. Williams, as to your concerns, does that
14 address it at least in part, if not entirely?

15 MS. WILLIAMS: Yes. Yes, Your Honor. Thank you.

16 THE COURT: Okay. Mr. Villa, anything about that
17 that you'd like to note at this point?

18 MR. VILLA: I think we would just stand on the
19 response we filed, Your Honor, that this isn't necessary and it
20 is encompassed in the rest of the jury instruction, but I
21 understand the Court's ruling.

22 THE COURT: Yes, sir. All right. Let me point you
23 to what is really just a typographical correction. Page 4,
24 last paragraph, I guess the fourth line from the bottom begins
25 with "conditions of her employment." I think we just removed

1 an "s," so that was corrected.

2 I'll call your attention also to Jury
3 Instruction No. 12. It's on page 17. We tried to remove
4 references last night to failure to promote, and so this one
5 slipped in or we didn't catch that, so we just removed the
6 phrase in the third line "or it fails to promote." That's,
7 again, to be consistent.

8 Then, let's see. If I could draw your attention to
9 number 36, page 41, the second and third paragraphs, in that
10 second paragraph it includes the line "overtime wages,
11 emotional distress, damage to reputation within the APD, and
12 loss of enjoyment of life." That's also to remain consistent
13 with what we had added last night. That third paragraph,
14 second line begins "damages for lost overtime wages, emotional
15 distress, damage to reputation within the APD, and loss of
16 enjoyment of life."

17 All right. Ms. Williams, again, that's just to
18 remain consistent, noting your objection.

19 MS. WILLIAMS: Yes. I understand, Your Honor. Thank
20 you.

21 THE COURT: All right. Mr. Villa, anything about
22 that?

23 MR. VILLA: No, Your Honor.

24 THE COURT: Okay. Let me just -- Adding the same
25 language, page 42, that's the fourth line from the bottom,

1 again where it begins "reputation within the APD."

2 Okay. So those are the changes that were made. They
3 are reflected in your final copy.

4 All right. Then I have to ask, we had Exhibit
5 Number 43 that was offered yesterday. I think I provisionally
6 admitted it for the limited purpose of explaining why
7 Mr. Potter did what he did; in other words, why he went to his
8 supervisor. I think it was Hubbard. So it's provisionally
9 admitted, but it's not entirely admitted, so the entire
10 document is not in evidence.

11 What is your position as to whether the entire
12 exhibit should be in evidence, Mr. Villa?

13 MR. VILLA: I think it should, Your Honor. I think
14 that rather than provisional, I understood the Court's ruling
15 to be it was offered for the limited purpose of showing the
16 effect on Mr. Potter and why he went to Commander Hudson, and
17 so I think the entire document is admissible for that purpose.
18 I think the Court appropriately instructed the jury on what its
19 limited purpose was, and in closing argument we are limited, as
20 well.

21 THE COURT: All right. Ms. Williams.

22 MS. WILLIAMS: Your Honor, we believe that there was
23 testimony elicited on the very subject that Mr. Villa's talking
24 about now that he wanted the exhibit to stimulate, and that
25 happened. The exhibit is replete with hearsay. It's lengthy

1 for the purpose of having him prompted to go to a supervisor.
2 He's testified that he did based on looking at a document. So
3 we don't believe that this needs to go back to the jury.

4 THE COURT: Okay. So Exhibit 43 is excluded. It was
5 published to the jury on the ELMO or the projector. It was
6 utilized by plaintiff's counsel to refresh recollection to
7 explain why Mr. Potter did what he did. I would note it's at
8 least a two-page document. It's a memo that was prepared. It
9 includes plaintiff's statements, which if admitted, were
10 offered by plaintiff would I think circumvent the statement by
11 party-opponent exception to the hearsay rule, and so the item
12 itself, Exhibit 43 is excluded, but, Mr. Villa, you may refer
13 to it as you need to in your argument to explain whatever
14 Mr. Potter did as a result of that report by plaintiff to the
15 supervisors.

16 Okay. So, all right. Before we do anything else, is
17 there anything I should take up, Mr. Villa?

18 MR. VILLA: No, Your Honor. I was just thinking,
19 because I think it will take a minute to read the instructions,
20 if I could just have a quick, five-minute break to set up
21 after, and that way if the jurors need to use the restroom or
22 anything after you read the instructions, we just take a quick,
23 five-minute break.

24 THE COURT: Sure. I think that's reasonable. All
25 right. Anything from you, Ms. Williams?

1 MS. WILLIAMS: No, Your Honor.

2 THE COURT: Okay. Let see. We have an hour and 15
3 minutes, so 75 minutes each. I'll be timing, as will Ms. Hall,
4 and so whatever balance you have, we'll make that known to you
5 as you begin.

6 MR. VILLA: Yes, Your Honor.

7 THE COURT: Or, rather, as you end.

8 Okay. Let's take a quick recess, and we'll be back
9 in session shortly.

10 (Court stood in recess at 8:43 a.m. and resumed at
11 8:46 a.m. as follows:)

12 THE COURT: All right. Please remain standing for
13 the jury.

14 (Jury in at 8:47 a.m.)

15 THE COURT: Okay. Good morning, everyone. Please be
16 seated.

17 All right. When we recessed last night, I mentioned
18 to you what the plan is for today. I'm going to begin by
19 instructing you on the law, and then after I am completed with
20 that, then each party will have an opportunity to make their
21 closing arguments. Now, the instructions I'm going to give to
22 you, you'll each have a copy for your deliberations. For now,
23 you may refer to the screens in front of you. Our staff
24 attorney will be leafing through these instructions as we go
25 along so you can listen and then you can read for yourself.

1 All right. Ladies and gentlemen, members of the
2 jury, you have now heard all of the evidence in the case. It
3 becomes my duty, therefore, to instruct you on the laws --
4 excuse me -- on the rules of law that you must follow and apply
5 in arriving at your decision in the case.

6 In any jury trial, there are, in effect, two judges.
7 I am one of the judges. The other is the jury. It is my duty
8 to preside over the trial and to determine what evidence is
9 relevant under the law for your consideration. It is also my
10 duty at the end of the trial to instruct you on the law
11 applicable to the case.

12 Number 1. You, as jurors, are the judges of the
13 facts. But in determining what actually happened in this
14 case -- that is, in reaching your decision as to the facts --
15 it is your sworn duty to follow the law I am now in the process
16 of defining for you.

17 And you must follow all of my instructions as a
18 whole. You have no right to disregard or give special
19 attention to any one instruction, or to question the wisdom or
20 correctness of any rule I may state to you. That is, you must
21 not substitute or follow your own idea or opinion as to what
22 the law is or ought to be. It is your duty to apply the law as
23 I give it to you, regardless of the consequences.

24 By the same token, it is also your duty to base your
25 verdict solely upon the evidence in the case, without prejudice

1 or sympathy.

2 Number 2. This case should be considered and decided
3 by you as an action between persons of equal standing in the
4 community, of equal worth, and holding the same or similar
5 stations in life. All persons stand equally before the law and
6 are to be dealt with as equals in a court of justice.

7 Number 3. In this lawsuit, plaintiff, Terysa Welch,
8 seeks compensation from the defendant City of Albuquerque for
9 damages which Ms. Welch claims were proximately caused by the
10 City's violation of Title VII of the Civil Rights Act of 1964
11 and the New Mexico Human Rights Act. Ms. Welch specifically
12 claims that the City violated Title VII and the New Mexico
13 Human Rights Act by engaging in sexual harassment and sex
14 discrimination.

15 Plaintiff claims that the sexual harassment by the
16 City occurred between May 2004 and 2012; and that the sex
17 discrimination by the City occurred between October 24th, 2008,
18 and 2012.

19 With respect to her Title VII claims, Ms. Welch
20 expressly seeks compensation for lost overtime wages, damage
21 she suffered to her reputation within the Albuquerque Police
22 Department, emotional distress, and loss of enjoyment of life.
23 With respect to her New Mexico Human Rights Act claims,
24 Ms. Welch seeks compensation for lost overtime wages, damage
25 she suffered to her reputation within APD, emotional distress,

1 and loss of enjoyment of life.

2 To establish a Title VII sexual harassment claim
3 against the City, Ms. Welch has the burden of proving that she
4 was intentionally subjected to unwelcome harassment by either
5 her supervisors or coworkers; that the harassment was based on
6 her sex; and that a reasonable person would find the harassment
7 hostile or abusive, and Ms. Welch perceived it to be so.

8 Ms. Welch must also show that the harassment was sufficiently
9 severe or pervasive as to alter the conditions of her
10 employment and create an abusive working environment. With
11 respect to sexual harassment by coworkers, Ms. Welch has the
12 burden of proving that the City or its management either knew
13 or should have known of the harassment, and failed to take
14 prompt and appropriate remedial action.

15 To establish a Title VII sex discrimination claim
16 against the City, Ms. Welch has the burden of proving that her
17 sex was a motivating factor in the City's decision to
18 discipline her or to transfer her from the Repeat Offender
19 Project, referred to here as ROP.

20 To establish a New Mexico Human Rights Act sexual
21 harassment claim against the City, Ms. Welch has the burden of
22 proving that the harassment was based on sex; she was subjected
23 to a hostile environment in which the offensive conduct had the
24 purpose or effect of unreasonably interfering with her work
25 performance or creating an intimidating, hostile, or offensive

1 working environment, and that the work environment was one that
2 a reasonable person would find hostile or abusive and one that
3 Ms. Welch perceived as being hostile or abusive.

4 To establish New Mexico Human Rights Act sex
5 discrimination claims against the City, Ms. Welch has the
6 burden of proving that she was otherwise qualified in December
7 2009 to be a detective in the ROP unit. Ms. Welch also has the
8 burden of proving that the City did one or more of the
9 following: A) disciplined her; B) transferred her from ROP;
10 or, C) discriminated in matters of compensation, terms,
11 conditions, or privileges of employment against her. Ms. Welch
12 further has the burden to prove that sex was a motivating
13 factor in the City's decision to take the above actions.

14 Ms. Welch has the burden of proving her Title VII and
15 New Mexico Human Rights Act claims by a preponderance of the
16 evidence and that the Title VII and New Mexico Human Rights Act
17 violations were the proximate cause of her damages.

18 Number 4. The City denies what Ms. Welch says about
19 sexual harassment and sex discrimination and argues it will
20 show the following by a preponderance of the evidence: One,
21 the City did not subject Ms. Welch to unwelcome harassment;
22 two, the City did not impose severe or pervasive conditions on
23 Ms. Welch's employment because of her sex; three, after the
24 City learned about Ms. Welch's complaints about her coworkers,
25 the City responded to her allegations promptly and took

1 appropriate remedial action; four, Ms. Welch's statements
2 regarding alleged discrimination were not sufficient to convey
3 to the City that Ms. Welch believed the City was acting in an
4 unlawful discriminatory manner within the meaning of the
5 New Mexico Human Rights Act; five, the City had a legitimate
6 nondiscriminatory business purpose or reason for every action
7 they took regarding Ms. Welch; six, the City did not take any
8 adverse employment action against Ms. Welch, and she has been
9 promoted twice since this lawsuit was filed; seven, not a
10 single term or condition of Ms. Welch's employment changed for
11 the worse during her employment; eight, the conditions placed
12 on Ms. Welch's employment, if any, were the result of
13 legitimate, nondiscriminatory reasons, not her sex; nine,
14 Ms. Welch's sex was not a motivating factor in any decision the
15 City made; and, ten, Ms. Welch cannot prove under either
16 Title VII or the New Mexico Human Rights Act that she is
17 entitled to damages proximately caused by the City's
18 impermissibly made employment decisions based on her sex.

19 Number 5. It is a general rule in civil cases that a
20 party seeking a recovery or a party relying on a defense has
21 the burden of proving every essential element of its claim or
22 defense by a preponderance of the evidence.

23 Now, to prove by a preponderance of the evidence
24 means to establish that something is more likely true than not
25 true. When I say in these instructions that a party has the

1 burden of proof, I mean that you must be persuaded that what is
2 sought to be proved is more probably true than not true.
3 Evenly balanced evidence is not sufficient.

4 Number 6. This page is intentionally left blank.

5 Number 7. Ms. Welch's first claim against the City
6 is for sexual harassment by the City itself or its supervisors
7 in violation of Title VII. To succeed on this claim, Ms. Welch
8 must prove by a preponderance of the evidence all four of the
9 following factors: First, that, between May 2004 and 2012, she
10 was intentionally subjected to unwelcome harassment by the
11 employer or by her supervisor; second, that the harassment was
12 based upon her sex; third, that the harassment was both
13 objectively and subjectively offensive, such that a reasonable
14 person would find it hostile or abusive, and Ms. Welch in fact
15 did perceive it to be so; and, fourth, that the harassment was
16 sufficiently severe or pervasive so as to alter the conditions
17 of her employment and create an abusive working environment.

18 Unwelcome harassment means conduct that is uninvited
19 and offensive or unwarranted -- excuse me -- unwanted. On
20 whether the conduct was objectively offensive, you may
21 consider, among other things, the frequency of the conduct, its
22 severity, whether it was physically threatening or humiliating,
23 or whether it was a mere offensive utterance, whether it
24 unreasonably interfered with an employee's work performance,
25 and its effect on the employee's psychological well-being.

1 Liability on this claim requires more than mere
2 utterance of an offensive remark. It does not, however,
3 require tangible psychological injury. There is no
4 mathematical precise test for determining whether words and
5 gestures meet the standard. Instead, you must consider the
6 evidence as a whole and the totality of the circumstances, such
7 as the nature of the conduct and the context in which it
8 occurred. Discriminatory intimidation, ridicule, and insult
9 can be sufficiently severe or pervasive in their accumulated
10 effect to alter the conditions of employment and create an
11 abusive working environment. The conduct or actions do not
12 have to be overtly sexual, but conduct that results from
13 genuine but innocuous differences in the way men and women
14 routinely interact with members of the same sex and of the
15 opposite sex is not illegal. Offhand comments, rudeness,
16 occasionally teasing and isolated incidents are not alone
17 sufficient. This is not a general civility code for the
18 workplace.

19 Number 8. The term "sex" as used to Title VII and
20 the New Mexico Human Rights Act is a synonym for the term
21 "gender" and refers to the quality of being male or female.

22 Number 9. Ms. Welch's second claim against the City
23 is for permitting sexual harassment by coworkers in violation
24 of Title VII. To succeed on this claim, Ms. Welch must prove
25 by a preponderance of the evidence all six of the following

1 factors: First, that, between May 2004 and 2012, she was
2 subjected to unwelcome harassment; second, that the harassment
3 was based upon her sex; third, that the harassment was both
4 objectively and subjectively offensive, such that a reasonable
5 person would find it hostile or abusive and Ms. Welch in fact
6 did perceive it to be so; fourth, that the harassment was
7 sufficiently severe or pervasive so as to alter the conditions
8 of her employment and create an abusive working environment;
9 fifth, the City or management-level employees of the City
10 either knew or should have known of the harassment; and, sixth,
11 the City and management-level employees of the City failed to
12 take prompt and appropriate remedial action.

13 Unwelcome harassment means conduct that is uninvited
14 and offensive or unwanted. On whether the conduct was
15 objectively offensive, you may consider, among other things,
16 the frequency of the conduct, its severity, whether it was
17 physically threatening or humiliating, or whether it was a mere
18 offensive utterance, and whether it unreasonably interfered
19 with an employee's work performance, and its effect on the
20 employee's psychological well-being.

21 Liability on this claim requires more than mere
22 utterance or -- excuse me -- mere utterance of an offensive
23 remark. It does not, however, require a tangible psychological
24 injury. There is no mathematical precise test for determining
25 whether words and gestures meet the standard. Instead, you

1 must consider the evidence as a whole and the totality of the
2 circumstances, such as the nature of the conduct and the
3 context in which it occurred. Discriminatory intimidation,
4 ridicule, and insult can be sufficiently severe or pervasive in
5 their accumulated effect to alter the conditions of employment
6 and create an abusive working environment. The conduct or
7 actions do not have to be overtly sexual. But conduct that
8 results from genuine but innocuous differences in the way men
9 and women routinely interact with members of the same sex and
10 with the opposite sex is not illegal. Offhand comments,
11 rudeness, occasional teasing and isolated incidents are not
12 alone sufficient. Once again, this is not a general civility
13 code for the workplace.

14 Number 10. If Ms. Welch satisfies all of the
15 requirements I have listed for sexual harassment by coworkers
16 under Title VII, then you shall consider the City's affirmative
17 defense. To prevail on its affirmative defense, the City must
18 prove by a preponderance of the evidence both of the following:
19 First, that it exercised reasonable care to prevent and correct
20 promptly sexually harassing behavior; second, that Ms. Welch
21 unreasonably failed to take advantage of any preventive or
22 corrective opportunities the City provided.

23 If you find that the City has proven both of these by
24 a preponderance of the evidence, your verdict on the Title VII
25 coworker sexual harassment claim must be for the City on this

1 claim.

2 If you find that the City has not met its burden of
3 proof on the Title VII coworker sexual harassment claim, your
4 verdict will be for Ms. Welch on that claim.

5 Number 11. Ms. Welch's third claim against the City
6 is for sex discrimination in violation of Title VII.
7 Specifically, Ms. Welch claims that the City took adverse
8 employment action against her because of sex discrimination.
9 To succeed on this claim, Ms. Welch must prove by a
10 preponderance of the evidence that her sex was a motivating
11 factor in the City's decision to discipline her or to transfer
12 her from ROP, and that the discipline or transfer from ROP
13 occurred between October 24th, 2008, and 2012.

14 An employer is free to discipline or to transfer an
15 employee for any nondiscriminatory reason even if its business
16 judgment seemed objectively unwise. But you may consider the
17 believability of an explanation in determining whether it is a
18 coverup or pretext for discrimination. To prove that the sex
19 was -- Let me begin that again. To prove that sex was a
20 motivating factor, Ms. Welch must show that the City used that
21 consideration in deciding to discipline her or to transfer her
22 from ROP.

23 Ms. Welch need not show that sex discrimination was
24 the only reason the City disciplined her or transferred her
25 from ROP. But she must show that the City relied upon sex

1 discrimination in making its decision to discipline Ms. Welch
2 or to transfer her from ROP.

3 Ms. Welch is not required to produce direct evidence
4 of unlawful motive. You may infer knowledge and/or motive as a
5 matter of reason and common sense from the existence of other
6 evidence -- for example, explanations that you find were really
7 pretextual. Pretextual means false or, though true, not the
8 real reason for the action taken.

9 An adverse employment action by a supervisor is an
10 action of the employer.

11 An adverse employment action is one that, standing
12 alone, actually causes damage, tangible or intangible, to an
13 employee. The fact that an employee is unhappy with something
14 his or her employer did or failed to do is not enough to make
15 the act or omission an adverse employment action.

16 An employer takes adverse action against an employee
17 only if it, one, takes something of consequence away from the
18 employee, for example, by discharging or demoting the employee,
19 reducing his or her salary, or taking away significant
20 responsibilities; or, two, fails to give the employee something
21 that is customary -- that is a customary benefit of the
22 employee relationship; for example, by failing to follow a
23 customary practice of considering the employee for promotion
24 after a particular period of service.

25 An involuntary transfer, without more, does not

1 constitute an adverse employment action if it does not involve
2 any significant changes to an employee's conditions of
3 employment. For example, an involuntary transfer does not
4 constitute an adverse employment action if salary and benefits
5 remain the same and duties are substantially the same.

6 If you find that Ms. Welch has not proven by a
7 preponderance of the evidence that the City used Ms. Welch's
8 sex in deciding to discipline her or to transfer her from ROP,
9 your verdict must be for the City.

10 But if you find that Ms. Welch has proven by a
11 preponderance of the evidence that her sex was a motivating
12 factor in the City's decision to discipline her or to transfer
13 her from ROP, then the burden of proof shifts to the City to
14 prove by a preponderance of the evidence that it would
15 nevertheless have taken the same action if it had not
16 considered Ms. Welch's sex.

17 If you find that the City has not met its burden of
18 proof, your verdict will be for Ms. Welch and you will proceed
19 to consider damages as I will describe them. But if you find
20 that the City has proven that it would not have taken the same
21 actions -- excuse me. But if you find that the City has proven
22 that it would have taken the same action regardless of
23 Ms. Welch's sex, you will not consider damages for this claim.

24 I have prepared a Special Verdict Form to assist you
25 in addressing these issues.

1 Number 12. In this case, you must also determine
2 whether the City violated a statute known as the New Mexico
3 Human Rights Act. An employer violates the New Mexico Human
4 Rights Act if sexual harassment occurs, or discriminates in
5 matters of compensation terms, conditions, or privileges of
6 employment against an otherwise qualified person based on sex.

7 Number 13. A person is otherwise qualified if she is
8 able to do the job in spite of her sex.

9 14. This page is intentionally left blank.

10 15. Ms. Welch's fourth claim against the City is for
11 sexual harassment under the New Mexico Human Rights Act.
12 Ms. Welch must prove by a preponderance of the evidence that,
13 first, that the harassment, which occurred between May 2004 and
14 2012, was based on sex; second, Ms. Welch was subjected to a
15 hostile environment in which the offensive conduct has the
16 purpose or effect of unreasonably interfering with her work
17 performance or creating an intimidating, hostile, or offensive
18 working environment; and, third, the work environment was both
19 objectively and subjectively hostile; one that a reasonable
20 person would find hostile or abusive and one that Ms. Welch did
21 perceive as being hostile or abusive.

22 When determining whether a work environment was
23 hostile or abusive, you look at the totality of the
24 circumstances, including the frequency of the discriminatory
25 conduct; its severity; whether it is physically threatening or

1 humiliating, or a mere offensive utterance; and whether it
2 unreasonably interferes with an employee's work performance.

3 Simple teasing, offhand comments, and isolated
4 incidents, unless extremely serious, will not amount to
5 discriminatory changes in the terms and conditions of
6 employment. Ordinary socializing in the workplace, such as
7 intersexual flirtation, should not be mistaken for
8 discriminatory conditions of employment.

9 Number 16. Ms. Welch's fifth claim against the City
10 is for sex discrimination under the New Mexico Human Rights
11 Act. To establish under the New Mexico Human Rights Act that
12 between October 24, 2008, and 2012 the City discriminated
13 against Ms. Welch based on her sex, Ms. Welch has the burden of
14 proving by a preponderance of the evidence the following:
15 First, that Ms. Welch was otherwise qualified to be a detective
16 in ROP from December 11, 2009, to 2012; second, that the City
17 did one or more of the following: A, disciplined Ms. Welch; B,
18 transferred Ms. Welch from ROP; or, C, discriminated in matters
19 of compensation, terms, conditions, or privileges of employment
20 against Ms. Welch. Third, that Ms. Welch's sex was a
21 motivating factor in the City's actions as described in
22 paragraphs A through C of the second element, above.

23 If you disbelieve the reasons the City has given for
24 the actions described in paragraphs A through C of the second
25 element, above, you may infer that the City took these actions

1 because of Ms. Welch's sex.

2 Number 17. An unlawful employment practice is
3 established under the New Mexico Human Rights Act when the
4 complaining party demonstrates that sex was a motivating factor
5 for the employment practice, even though other factors also
6 motivated the practice.

7 Number 18. A municipality, like the City, can act
8 only through its officers and employees. Any act or omission
9 of an officer or an employee of a municipality, within the
10 course -- within the scope or course of his or her employment,
11 is the act or omission of the municipality.

12 Number 19. The defendant in this case is a
13 municipality. A municipality is entitled to the same fair and
14 unprejudiced treatment as an individual, and you should decide
15 the case with the same impartiality as you would use in
16 deciding a case between individuals.

17 Number 20. As stated earlier, it is your duty to
18 determine the facts, and in doing so you must consider only the
19 evidence I have admitted in the case. The term "evidence"
20 includes the sworn testimony of the witnesses and the exhibits
21 admitted in the record.

22 Remember that any statements, objections, or
23 arguments made by the lawyers are not evidence in the case.
24 The function of the lawyers is to point out those things that
25 are most significant or helpful to their side of the case, and

1 in doing so, to call your attention to certain facts or
2 inferences that might otherwise escape your notice. In the
3 final analysis, however, it is your own recollection and
4 interpretation of the evidence that controls in the case.
5 Whatever the lawyers say is not binding upon you.

6 So, while you should consider only the evidence in
7 the case, you are permitted to draw such reasonable inferences
8 from the testimony and exhibits as you feel are justified in
9 the light of common experience. In other words, you may make
10 deductions and reach conclusions which reason and common sense
11 lead you to draw from the facts which have been established by
12 the testimony and evidence in the case.

13 Number 21. You may consider either direct or
14 circumstantial evidence. Direct evidence is testimony of one
15 who asserts actual knowledge of a fact, such as an eyewitness.
16 Circumstantial evidence consists of proof of facts or
17 circumstances which give rise to a reasonable inference of the
18 truth of the fact sought to be proved. The law makes no
19 distinction between the weight to be given to either direct or
20 circumstantial evidence.

21 Number 22. Now, as I have said, that you must
22 consider all of the evidence. This does not mean, however,
23 that you must accept all of the evidence as true or accurate.

24 You are the sole judges of the credibility or
25 believability of each witness and the weight to be given to the

1 witness's testimony. In weighing the testimony of a witness,
2 you should consider the witness's relationship to the plaintiff
3 or to the defendant; the witness's interest, if anything, in
4 the outcome of the case; manner of testifying, opportunity to
5 observe or acquire knowledge concerning the facts about which
6 the witness testified; candor, fairness and intelligence; and
7 the extent to which the witness has been supported or
8 contradicted by other credible evidence or previous statements
9 inconsistent with the witness's present testimony. You may, in
10 short, accept or reject the testimony of any witness in whole
11 or in part.

12 Also, the weight of the evidence is not necessarily
13 determined by the number of witnesses testifying as to the
14 existence or nonexistence of any fact. You may find that the
15 testimony of a smaller number of witnesses as to any fact is
16 more credible than the testimony of a larger number of
17 witnesses to the contrary.

18 Number 23. A witness may be discredited or impeached
19 by contradictory evidence or inconsistent conduct, or by
20 evidence that at other times the witness has made material
21 statements, under oath or otherwise, which are inconsistent
22 with the present testimony of the witness.

23 If you believe that any witness has been impeached or
24 discredited, it is your exclusive province to give the
25 testimony of that witness only such credit as you may think it

1 deserves.

2 Number 24. An expert witness is permitted to state
3 an opinion based upon a question which, for the purposes of
4 trial, assumes as true certain facts which may or may not be
5 true.

6 It will be for you in your deliberations, however, to
7 determine from all of the evidence whether or not the facts
8 assumed have been proved to be true.

9 The Rules of Evidence provide that if scientific,
10 technical, or other specialized knowledge might assist you in
11 understanding the evidence or in determining a fact in issue, a
12 witness qualified as an expert by knowledge, skill, experience,
13 training, or education, may testify and state an expert opinion
14 concerning such matters.

15 You should consider each expert opinion received in
16 evidence in this case and give it such weight as you may think
17 it deserves. If you should decide that the opinion of an
18 expert witness is not based upon sufficient education and
19 experience, or if you should conclude that the reasons given in
20 support of the opinion are not sound, or that the opinion is
21 outweighed by other evidence, then you may disregard the
22 opinion entirely.

23 Number 25. This page is intentionally left blank.

24 Number 26. Some evidence is admitted for a limited
25 purpose only. When I instruct you that an item of evidence has

1 been admitted for a limited purpose, you must consider it only
2 for that limited purpose and for no other.

3 Number 27. Deposition testimony is testimony that
4 was taken under oath before trial and has been preserved in
5 writing. This testimony is entitled to the same consideration
6 that you give any other testimony at this trial.

7 Number 28. This page is intentionally left blank.

8 Number 29. An attorney has the right to interview a
9 witness for the purpose of learning what testimony the witness
10 will give. The fact that the witness has talked to an attorney
11 does not reflect adversely on the truth of such testimony.

12 Number 30. Any notes that you have taken during this
13 trial are only aids to your memory. If your memory differs
14 from your notes, you should rely on your memory and not on your
15 notes. Your notes are only to refresh your recollection. The
16 notes are not evidence. If you have not taken notes, you
17 should rely on your independent recollection of the evidence
18 and should not be influenced by the notes of other jurors.
19 Notes are not entitled to any greater weight than the
20 recollection or impression of each juror about the testimony.

21 Number 31. An act is a cause of harm if it
22 contributes to bringing about the harm, and if the harm would
23 not have occurred without it. It need not be the only
24 explanation for the harm, nor the reason that is nearest in
25 time or place. It is sufficient if it occurs in combination

1 with some other cause to produce the result. To be a cause,
2 the act, nonetheless, must be reasonably connected as a
3 significant link to the harm.

4 Number 32. You are not to engage in any discussion
5 of damages unless you first determined -- unless you have first
6 determined that there is liability, as elsewhere covered in
7 these instructions.

8 The fact that you are given instructions on damages
9 is not to be taken as an indication as to whether the Court
10 thinks damages should or should not be awarded.

11 Number 33. Damages must be reasonable. If you
12 should find that the plaintiff is entitled to a verdict, you
13 may award only those damages which will reasonably compensate
14 the plaintiff for the injuries that the plaintiff has sustained
15 as a result of the defendant's wrongful conduct. You are not
16 permitted to award speculative damages. So, you are not to
17 include in any verdict compensation for any prospective loss,
18 which, although possible, is not reasonably certain to occur in
19 the future.

20 Number 34. You must not award compensatory damages
21 more than once for the same injury. For example, if a
22 plaintiff prevails on more than one of the plaintiff's claims
23 and establishes a dollar amount for the plaintiff's injuries,
24 you must not award the plaintiff any additional compensatory
25 damages on each claim. The plaintiff is only entitled to be

1 made whole once, and may not recover more than the plaintiff
2 has lost. Of course, if injuries -- Excuse me. Of course, if
3 different injuries are attributable to the separate claims,
4 then you must compensate the plaintiff fully for all injuries.

5 Number 35. Intentionally left blank.

6 Number 36. Now, once again, the fact that I instruct
7 you on damages does not represent any view by me that you
8 should or should not find the City liable.

9 Now, with respect to her Title VII claims, Ms. Welch
10 seeks to recover damages for lost overtime wages, emotional
11 distress, damage to reputation within APD, and loss of
12 enjoyment of life.

13 With respect to her New Mexico Human Rights Act
14 claims, Ms. Welch seeks to recover damages for lost overtime
15 wages, emotional distress, damage to reputation within APD, and
16 loss of enjoyment of life.

17 Distress arising from this lawsuit, or legal expenses
18 incurred in this lawsuit must not be included in these damages.
19 You must determine, instead, what other loss, if any, Ms. Welch
20 has suffered caused by any sexual harassment or sex
21 discrimination in violation of Title VII or the New Mexico
22 Human Rights Act that you find the City has committed under the
23 instructions I have given you. We call these compensatory
24 damages.

25 You may award compensatory damages for lost overtime

1 wages, any damage to reputation suffered by Ms. Welch within
2 APD, emotional distress, or loss of enjoyment of life if you
3 determine that Ms. Welch has proven by a preponderance of the
4 evidence that she has experienced any of these consequences as
5 a result of sexual harassment or sex discrimination in
6 violation of Title VII.

7 You may award compensatory damages for lost overtime
8 damages, any damages to reputation suffered by Ms. Welch within
9 APD, emotional distress, or loss of enjoyment of life if you
10 determine that Ms. Welch has proven by a preponderance of the
11 evidence that she has experienced any of these consequences as
12 a result of any sexual harassment or sex discrimination in
13 violation of the New Mexico Human Rights Act.

14 No evidence of the monetary volume of intangible
15 things like emotional distress, loss of enjoyment of life, and
16 damage to reputation is available and there is no standard I
17 can give you for fixing any compensation to be awarded for
18 these injuries. Even though it is obviously difficult to
19 establish a standard of measurement for these damages, that
20 difficulty is not grounds for denying a recovery on this
21 element of damages. You must, therefore, make the best and
22 most reasonable estimate you can, not from a personal point of
23 view, but from a fair and impartial point of view, of the
24 amount of emotional distress, loss of enjoyment of life, or
25 damage to reputation within the APD, you find that Ms. Welch

1 has undergone as a result of the City's conduct. You must
2 place a money value on this. Attempting to come to a
3 conclusion that you -- a conclusion that will be fair and just
4 to both of the parties. This will be difficult for you to
5 measure in terms of dollars and cents, but there is no other
6 rule that I can give you for assessing this element of damages.

7 Number 37. In fixing the amount of money which will
8 reasonably and fairly compensate a plaintiff, you should
9 consider that one who is damaged must exercise ordinary care in
10 minimizing existing damages and to prevent further damages. A
11 plaintiff may not recover for losses which could have been
12 prevented by reasonable efforts by the plaintiff.

13 The burden of proof with respect to this issue is on
14 the defendant.

15 All right. I'm up to number 38. I'm going to
16 reserve 38, 39, and 40 for the point when the parties have
17 concluded their arguments, and so for that we will begin with
18 Mr. Villa, but as we start, we're going to take just a
19 five-minute break.

20 All right. For that, please rise for the jury.

21 (Jury out at 9:29 a.m.)

22 THE COURT: Okay. Mr. Villa, do you want to set up?

23 MR. VILLA: Yes, Your Honor. Thank you.

24 THE COURT: Okay. You're welcome. All right. We'll
25 just be in recess, back in about five minutes.

1 (Court stood in recess at 9:29 a.m. and resumed at
2 9:38 a.m. as follows:)

3 MS. WILLIAMS: Your Honor, will we be having a
4 midmorning break between Mr. Villa and myself?

5 THE COURT: Is that what you'd like?

6 MS. WILLIAMS: I think so.

7 THE COURT: Okay. Let's do that.

8 MS. WILLIAMS: Thank you.

9 THE COURT: You're welcome.

10 I think we had jurors running to the restroom while
11 they're standing in line, so that's what's going on.

12 Okay. Let's go.

13 (Jury in at 9:38 a.m.)

14 THE COURT: Okay. Please be seated.

15 Ladies and gentlemen, for closing arguments,
16 summations, because the plaintiff has the burden of proof, the
17 plaintiff goes first.

18 Mr. Villa.

19 MR. VILLA: Thank you, Your Honor. May it please the
20 Court, counsel, Ms. Welch.

21 Ladies and gentlemen, on behalf of Ms. Welch,
22 Ms. Anderson, and myself, we want to thank you for your time.
23 We appreciate that you all have been here, you've sacrificed,
24 given up time away from your lives and businesses and paid
25 close attention to the evidence in this case. So we're now at

1 the end, and I'm going to take just a little bit more of your
2 time before you get to decide the case. So what we are going
3 to ask you to do at the end of this closing argument is to go
4 back into the jury room and deliberate on Ms. Welch's claims of
5 sexual harassment discrimination and find in her favor and fix
6 the appropriate amount of damages to fully compensate her for
7 those claims.

8 Now, sexual harassment, as you saw from the jury
9 instructions, comes in two forms: By supervisors and by
10 coworkers. But the evidence that you saw in this trial is that
11 the sexual harassment came in a little different form for
12 Terysa Welch. You have what came from Rob Smith, which we'll
13 get into in detail that you've heard a lot about, which I would
14 call sort of the true form of sexual harassment, the note that
15 he wrote on her physical assessment, telling her he wanted to
16 have children with her, the constant commenting to her about
17 her clothing, her looks, his behavior and attitude, which you
18 got to see a flavor of when he testified. And those other
19 things that you also saw a little bit from J.R. Potter. He
20 joked and laughed with Robert Smith in front of Terysa Welch
21 about his genitals. He admitted that he did that on the stand.
22 That is the classic form of sexual harassment.

23 And then there's the hostile work environment form of
24 sexual harassment, the things that Terysa Welch experienced
25 from the beginning of ROP and throughout her time, not from

1 everybody, but from folks like Kevin Gagne, who commented when
2 Terysa came into ROP that "We got F'd. We had to take a
3 skirt." Some of the newer -- or the old guard folks in ROP.
4 One in particular, Dan Wolfe who stood up, according to Danny
5 Garcia, and said, you know, "There's no chicks that are going
6 to be in ROP," and the attitudes and behavior that Ms. Welch
7 experienced throughout her time in ROP as from the time period
8 as the judge instructed you, 2004 to 2012.

9 Not everybody was sexually harassing to her. That
10 was primarily Rob Smith. But a lot of the evidence you saw
11 came in the form of hostility. And what we ask you to evaluate
12 is what damage did that sexual harassment cause Ms. Welch.
13 Well, it caused her to transfer, caused her to lose what she so
14 loved in the ROP unit. Remember her testimony from the time
15 she got to the Academy and the ROP guys came in, that's what
16 she wanted to do. And a lot of people wanted to do that.
17 Heck, even Kevin Gagne said that's what he wanted to do. And
18 you heard that that's one of the great benefits of being in the
19 law enforcement profession. You can gravitate to different
20 areas and do what you love. And that was taken away from
21 Terysa because of sexual harassment.

22 You had heard about the buildup of events, the chain
23 of events that happened that led to that transfer. Did she say
24 "Yes, I want to be transferred"? Absolutely. Did she have a
25 choice? Absolutely not. She had finally had it come July when

1 she received that punctuality memo for what she felt was an
2 improper reason, missing a training when she was told the day
3 before by Kevin Gagne to go to the station. Mike Hill
4 testified that was what the order that was given by the Acting
5 Sergeant Kevin Gagne. And when there was this confusion,
6 Sergeant Hubbard didn't try to talk to Mike Hill, he didn't try
7 to talk to Kevin Gagne, he just sent her a punctuality memo and
8 claimed that he had issues with her performance. But you saw
9 the evidence.

10 There was no issues with her performance. Her
11 performance evaluation, which I'll show you here in a minute,
12 showed clearly that through the year 2009 there weren't any
13 issues. So why is it Sergeant Hubbard and later Lieutenant
14 Smith and Commander Hudson are all talking about Terysa Welch's
15 performance when nothing else is going on? Why do they come in
16 and say that to you? Because, ladies and gentlemen, that's
17 just a pretext for their conduct. It's a pretext for the real
18 reasons they did what they did. And so that transfer was
19 because of the sexual harassment.

20 Remember the testimony from Beth Paiz and the notes
21 that you have in evidence, Exhibit 4, which I'm going to show
22 you a little bit more. She was asking Terysa, "Do you feel
23 safe at work? Are you going to be okay? Can you wait until
24 January? We'll do this temporary transfer to the Academy,
25 we'll sort this situation out, and we'll get you back."

1 But Terysa had to go on December 11th, 2009, right
2 after the Rob Smith incident in the hallway where in a hallway
3 as large as this area between the jury box and the chairs he
4 made it so Terysa Welch had to get out of the way and go up
5 against the wall.

6 She had received a blank transfer form in her inbox.
7 She was complained about by Kevin Gagne and J.R. Potter, two
8 people who she named in her EEOC Complaint, to Commander
9 Hudson. He wrote her a memo, made her respond to that memo.
10 She knew what was going on. This was a buildup that these
11 individuals were partaking in to get rid of her, and they were
12 doing it, they were being hostile towards her and harassing
13 towards her, and sex was a motivating factor.

14 You saw the jury instructions. It doesn't have to be
15 the only factors. It has to be a motivating factor. This is a
16 woman, the only woman in ROP who's complaining about behavior
17 because she's a woman, and this is how these individuals
18 reacted to it and caused her that transfer.

19 And then we get to the discipline. And you heard
20 about how the discipline came about. Who initiated it? Kevin
21 Gagne. Kevin Gagne just two months after he was interviewed by
22 the EEOC investigator asking him about whether he was hostile
23 to her because she was a woman, calls and reports her for what
24 is otherwise a fairly minor violation, that you heard from two
25 men how it was handled in their situation, and she gets run

1 through the wringer by the very same individuals that were
2 involved in this.

3 Who investigated the original Complaint? Doug West.
4 Who was the individual that ordered Terysa's alcohol violation
5 to go through the Internal Affairs process? Doug West. Who is
6 the individual that recommended her termination because of what
7 he perceived to be false statements? Clearly that was a
8 pretext. Doug West. And, granted, Chief Feist reviewed that
9 and said he didn't sustain anything related to false
10 statements. He only sustained things related to alcohol.

11 Chief Schultz didn't impose the recommended
12 discipline for an alcohol violation, which is a written
13 reprimand. He imposed discipline that he said was 40 hours,
14 and that was his threshold policy for reporting things to the
15 New Mexico Law Enforcement Academy, but we'll show you here in
16 a minute the discipline he imposed was actually a 16-hour
17 suspension and 24 held in abeyance, yet that discipline then
18 gets reported to the New Mexico Law Enforcement Academy. And
19 in the letter which you all saw to the New Mexico Law
20 Enforcement Academy she was accused of much more severe things
21 than she was actually have found to have been done that ended
22 up creating a letter in her file that's there forever.

23 And you have to ask yourself, was that -- what was
24 the reason that was done. Everybody involved knew that she
25 complained. Chief Schultz knew from the beginning that she had

1 complained about this, that these issues were at the boiling
2 point in ROP based on Terysa Welch's Complaint, a woman who's
3 complaining about being mistreated as a woman.

4 And then what was the final outcome of Chief
5 Schultz's discipline? It was not consistent with what other
6 men who have done the same things had received. And it was
7 much, much more severe. And that's hostility, ladies and
8 gentlemen, and it's hostility based, at least a motivating
9 factor is sex. And so the transfer and the discipline and the
10 results of the transfer and discipline and the damage Terysa
11 Welch suffered was because of sexual harassment.

12 It was also discrimination. And discrimination is,
13 again, is sex a motivating factor. Well, let's look at the
14 transfer. What happened? She made her Complaint, and they
15 moved out two males, Lieutenant Smith and Sergeant Hubbard.
16 They didn't move out Kevin Gagne or J.R. Potter. And then they
17 quickly moved them back in just a couple of months. And the
18 hostility didn't stop. It resumed, it increased, it got worse.
19 It got to the point where Lieutenant Smith was trying to bull
20 her over in the hallway. People were putting blank transfer
21 forms in her box. J.R. Potter and Kevin Gagne are accusing her
22 of things that are very serious: Failing to cover, dropping a
23 surveillance, things that Terysa has never, ever been accused
24 of before in her life, things that are damaging to her -- to
25 her reputation. And they don't move out these individuals,

1 they don't address these individuals, they don't sit down with
2 these individuals and say "Why are you doing this? We need to
3 stop this behavior, we need to get this better." No, it gets
4 to the point where Terysa, a woman, gets moved so that the men
5 get to stay and the woman gets moved. That's discrimination.
6 The transfer was discrimination, ladies and gentlemen.

7 And she didn't get to be moved back with these guys
8 being moved out. They got to stay. Commander Hudson got to
9 stay and retire in the summer of 2010. Rob Smith got to stay
10 and retire in the summer of 2010. Sergeant Hubbard got to stay
11 and retired in the fall of 2010. Kevin Gagne got to stay and
12 retired at the end of 2011. So they all got to stay. They all
13 got to stay in ROP, the job that they loved, that they wanted
14 to do, and Terysa Welch didn't.

15 And the discipline, as I've talked about, that's
16 discrimination, too. You heard two examples, males who got --
17 one got verbal counseling, and one got a written reprimand. So
18 why did Terysa Welch not get the same treatment? Did you see
19 any evidence that this was really different? You know they
20 accused her of lying in Internal Affairs. And all the evidence
21 is she admitted she went to the Walgreen's all the time. She
22 admitted that she'd used her City vehicle to transfer alcohol
23 home before. She admitted that she was there on that day when
24 she saw the video and the receipts, and all she'd said was she
25 couldn't remember that day. And that's the excuse they used to

1 try to treat her differently. Well, you get to decide whether
2 that's a legitimate excuse or not, whether that's not pretext
3 or something else, and whether her sex is a motivating factor.
4 And I think we've established that it is.

5 Now, when it comes to fixing the damages, you saw the
6 judge's instruction for the nonspecific damages or the
7 nonmonetary damages. There's no set formula. So we have the
8 loss of overtime. And that shows you right there, ladies and
9 gentlemen, a clear difference between the benefits that are
10 available in ROP and those that are available in Burglary. You
11 also heard about the differences in the two units. ROP is
12 clearly more prestigious, it's looked up to, it furthers one's
13 career and reputation much more than in the Burglary unit. But
14 it's undisputed that Terysa Welch made less overtime.

15 Brian McDonald reviewed her pay stubs from '08 and
16 '09 and then compared 2010, '11, and '12 and conclusively saw
17 that she lost overtime. And that is a benefit of being in the
18 ROP unit. That amount is fixed. That's easy for you to
19 decide. Twenty-seven thousand six hundred and I believe it was
20 thirty-nine dollars.

21 But the other damages, the emotional distress, the
22 damage to reputation, and the loss of enjoyment of life, all
23 damages that are allowed by law, that are there to fully
24 compensate somebody when they suffer harassment, discrimination
25 are not specific, and it's a difficult thing to decide.

1 But what I would say to you is a couple of things.
2 If you fully compensate Terysa Welch, it doesn't just
3 compensate her for what she lost, but it also makes it clear
4 that this type of behavior isn't going to be tolerated; that
5 we're not going to put up with it; that you as the deciders of
6 this, the voice of the community are saying, we're not going to
7 allow these things to happen, and when it does, we're going to
8 fully compensate people for it.

9 And when you try to evaluate how you do it, we've got
10 different time frames. You know, they're -- unfortunately,
11 they don't teach us this in law school. Lots of people
12 disagree about how to do it. You could take a daily amount.
13 You could take a monthly amount, a yearly amount, a weekly
14 amount. It's difficult. I'm going to suggest some things to
15 you-all as we go through.

16 I've got a little death by PowerPoint for you, but
17 you get to decide. You can agree with me or disagree with me.
18 You can say what I'm asking for is too much or too little, and
19 you are ultimately the voice of the community, but I want you
20 to think about what it means to have emotional distress, to
21 suffer damage to your reputation within the Police Department,
22 to lose that enjoyment of life that we get from our jobs and
23 our careers, and decide that fully compensating Terysa Welch
24 would be the best way not only to give her back what she lost,
25 but to send a message.

1 So let me show you this. I'll switch over to the
2 HDMI. So when people show you who they are, believe them. And
3 I think that that makes sense in this case, because you got to
4 see a lot of who people were on the witness stand. It's kind
5 of amazing how when a witness is on the stand some of their
6 true colors come out. Okay. So think about the day and a half
7 Terysa Welch was on the stand and how you evaluated her and
8 what that told you about her character, her up there telling
9 you what happened, what she went through, dealing with
10 cross-examination from Ms. Williams, and compare that to some
11 of the other witnesses who also showed you who their true
12 colors were on the stand. Rob Smith, J.R. Potter, Kevin Gagne.
13 What did you evaluate about their credibility when you got to
14 see them? You can rely on your common sense, you can rely on
15 your instinct and your gut about how you saw what went down
16 there.

17 So, of course, just to reiterate, the APD and ROP
18 unit in 2009, Chief Schultz is the chief; there's two different
19 deputy chiefs, Paiz and Feist, over this period of time. They
20 command larger divisions, but they also cover the Special
21 Investigations Division. And the Special Investigations
22 Division was overseen by Commander Joseph Hudson during this
23 time period, and later Doug West, when he was reviewing the
24 Internal Affairs thing. The lieutenant at the time in 2009 is
25 Robert Smith, and Sergeant Dave Hubbard is in the unit and is

1 the sergeant of the unit. And the detectives that were in
2 there, who most of whom you heard from, Danny Garcia, Mike
3 Hill, Kevin Gagne, J.R. Potter, Terysa Welch, one individual
4 who we didn't get to hear from who was in the unit for a little
5 while, Ron Baca, but you got to see all of those individuals
6 testify. Mike Hill, Danny Garcia, those individuals were
7 sincere, genuine, legitimate. You saw their testimony. You
8 get to decide that. And then compare their testimony with the
9 testimony of the others and the differences in terms of their
10 credibility, whether they made statements that were different
11 in their depositions, and some of the things they said.

12 So let's talk about Lieutenant Rob Smith. There's
13 Exhibit 166, the personal fitness evaluation and wanting to
14 have children with you. Think about something when it comes to
15 sexual harassment. There's a famous Supreme Court case -- of
16 course, as a lawyer, those are the things that we think
17 about -- from 1964, the same time as the Title VII Civil Rights
18 Act, where the justices were looking at pornography and trying
19 to decide what's covered by the First Amendment and what's not,
20 and Justice Potter Stewart sort of had this famous saying. He
21 said, "I can't define it, but I know it when I see it." And I
22 think that holds true in some regards to sexual harassment.
23 There's some things that you know it when you see. And this,
24 ladies and gentlemen, on this personal fitness evaluation, this
25 is sexual harassment. You know it when you see it. He wants

1 to have children with you.

2 And think about how the City tried to deal with that.
3 They said, "Oh, Rob Smith said to everybody 'I want to have
4 your baby.'" That was his way of complimenting people, his
5 unusual way of complimenting people. Well, if it was just
6 that, if he just said to everybody, "I want to have your baby,"
7 right, he's a man, he can't have babies, maybe that's in that
8 gray area, maybe that's not something that you know it when you
9 see it, but when he tells a woman "I want to have children with
10 you," that crosses the line.

11 And you heard differing testimony. I mean, I even
12 asked Commander Hudson his -- Rob Smith's good friend, "Did he
13 ever say he wanted you to have his baby?" He said, "No, he
14 didn't tell me that." Right? J.R. Potter, the same thing.
15 "Did he ever say to you he wanted you to have his baby?" "No,
16 he didn't tell me that."

17 So, whether they were told that or not by Rob Smith,
18 it clearly never went the other way, but it did go the other
19 way with Terysa, and in the relationship between Rob Smith and
20 Terysa Welch, there's only one person that can have a baby, and
21 that's Terysa Welch. And this crosses the line.

22 But it's not just this, ladies and gentlemen. You
23 heard Terysa's testimony that this was all the time, he talked
24 about his genitals, he talked about his penis looking like a
25 tuna can. He came up to her when she was alone all the time

1 and said things like "Um, um, looking good," mentioned wanting
2 to have children with her, had this Viking story that he liked
3 to tell, that he told you about it, you got to have a flavor of
4 that, and said many times to her he would be pursuing her if
5 she wasn't married. You didn't hear him say that to any of his
6 male colleagues whatsoever.

7 And the David Maes incident. If you think about how
8 that happened, that's not supporting your colleague. That's
9 not trying to help somebody through a crisis incident. That is
10 Rob Smith taking advantage of Terysa in a very, very vulnerable
11 time in her life and saying things during that exchange, like,
12 "If I wasn't married, I'd be pursuing you," and "Let me take
13 you home" and being extremely inappropriate. That gives you an
14 idea of what Rob Smith was like.

15 And I suppose the City's going to say, well, Terysa
16 Welch was supposed to do something about that. Well, from 2004
17 to 2006 or '7 Rob Smith is the sergeant. He's running the
18 place. He's an up-and-comer. He's looked up to. He's the one
19 that advocates for Terysa to come into the unit, and she's
20 supposed to take him on. He's got the clout to then become the
21 lieutenant of that unit. And according to Commander Hudson,
22 when Terysa went to talk to him, he was next in line to be
23 commander. This is the person Terysa's supposed to take on.
24 And she wants to keep her job in ROP?

25 We've got the Sip and Shop note. This is just

1 another example of something that Rob Smith did. And it's
2 interesting that his best friend, who he considers a brother,
3 came in here yesterday and said, "Oh, Terysa made copies of
4 this and Terysa asked for this autograph." And that was the
5 first time that anybody had said that. And this evidence was
6 available from the beginning of the case. Not a single person
7 came in here, not even Rob Smith, and said Terysa made copies
8 of this and Terysa asked for this autograph. But J.R. Potter
9 did. What does that tell you about J.R. Potter's credibility
10 and whose side he's on?

11 When we talk about whether this was -- whether it
12 altered Terysa's work environment, what did she talk about?
13 She tried to avoid him. She tried to be with someone else when
14 Rob Smith was around because he wouldn't do it when she was
15 with other people. She even went in a different direction.

16 In commenting on these baby comments, I asked
17 Sergeant Hubbard -- well, I asked Kevin Gagne about his
18 behavior, and he said, "Well, you know, I didn't think it was
19 funny, it wasn't appropriate." I asked David Hubbard if he
20 said to people "Good job, I want you to have my baby," and
21 Hubbard's response on the stand was, "Well, I didn't cross that
22 line because that's a line you don't cross," because even
23 Sergeant Hubbard recognized that that's inappropriate.

24 And again, I think we have to question what's going
25 on when the City is trying to tell you that, oh, that's just

1 the way Rob Smith is, that's the way he compliments people,
2 that's how he is. We've got to question that when you talk
3 about Danny Garcia. Danny Garcia went to the Academy with him.
4 Danny Garcia was his workout partner. Danny Garcia got up
5 there on the stand and said Rob was a go-getter, he was a good
6 sergeant, if I needed a helicopter, he would get me a
7 helicopter. He didn't get up there and disparage Rob Smith
8 when it came to his job as a police officer, but he said, "He
9 never said that to me, he never made those comments to me:
10 'Good job, Danny, I want to have your baby.'" Right? I mean,
11 that's his friend up there telling you the truth. That's
12 something I think you need to think about when you're
13 considering what really went on in this workplace.

14 So then we get to this punctuality memo. And like I
15 told you in opening statement, the punctuality memo I think was
16 really the straw that broke the camel's back for Terysa. She'd
17 had enough, she'd put up with this long enough. Now things
18 were going to get put into her file that could, as Sergeant
19 Hubbard admitted, be a basis for discipline.

20 And again, the type of hostility that Sergeant
21 Hubbard, Kevin Gagne, and these individuals were expressing
22 toward Terysa were not sexually overt like Rob Smith. It was
23 more subtle. They were more hostile to her. They were more
24 hostile.

25 Think about what Terysa and Kevin Gagne told you

1 happened with the whole pink shirt thing. Right? Terysa was
2 trying to get Kevin Gagne to lighten up; so she wore a pink
3 shirt. Why did she do that? Because it's feminine. Kevin
4 Gagne said that. She was doing that because she recognized
5 that Kevin Gagne had a problem with her throughout the time
6 that they were in ROP, and she knew that it was related to her
7 being a woman, so she wore a pink shirt and tried to lighten
8 the guy up.

9 This is the same type of hostility that Terysa's
10 experiencing now from Sergeant Hubbard when she gets a memo for
11 missing this training day. Mike Hill doesn't, even though
12 she's with Mike Hill and Mike Hill calls Kevin Gagne when
13 they're at the station and says, you know, "We're here, we
14 thought we were supposed to be here," and Sergeant Hubbard
15 doesn't bother to look into the situation, talk to Mike Hill,
16 talk to Kevin Gagne.

17 In fact, Kevin Gagne even got up here and said,
18 "Well, I'm an acting sergeant; acting sergeants can't give
19 orders."

20 I mean, does that make sense at all, that Kevin Gagne
21 would come up here and tell you acting sergeants can't give an
22 order and right after that J.R. Potter says, "Yeah, they can
23 give orders"? What's Kevin afraid of. He knows that this is
24 an issue, this issue with whether he told Mike Hill and Terysa
25 to be at the station or be at the range, and yet he's up here

1 denying that he was even able to give an order.

2 And I find it interesting as David Hubbard gets up
3 here and says when he gives the memo to Terysa, she's screaming
4 and she's yelling, and she's irate, "I couldn't even understand
5 some of things that she said," but he didn't document that. He
6 documents that she missed a training and missed a briefing, he
7 doesn't bother to investigate whether she was comp'd out for
8 the briefing, and then gets up here and tells you that she's
9 screaming, yelling, and irate to her sergeant in this
10 paramilitary organization, and he didn't think it was important
11 to document this.

12 Now, again, I talked to you about performance. And
13 performance, it's clear from the evidence that performance was
14 just a pretext. All of this talk about performance, the
15 suggestion that this is why they're not happy with Terysa or
16 this is why there's problems is her lack of performance.
17 That's a pretext, ladies and gentlemen. If performance was an
18 issue, they could document performance. They could write her a
19 memo saying "We need you to make more arrests, we need you to
20 do a better job developing informants, we need you to create
21 more cases, we need this and we need that." And this is the
22 most recent performance evaluation through 2009. And on
23 expectations, "Detective will be self-motivated and demonstrate
24 initiative in locating and apprehending repeat offenders.
25 Expectation met." Right? "Conduct complete and professional

1 investigations," that's met. Professional working
2 relationships is met, conform to the Department rules is met.
3 And where is the comments and recommendations from her
4 supervisor? You all can use your common sense. These
5 performance evaluations are there for a reason. Hey, your
6 expectations are met, but in here, in these comments and
7 recommendations, you know, I'd like to see a little bit more of
8 this, that, and the other. That would be in there if that's
9 what really happened, and it's not in there.

10 So I just want to run down this timeline that we have
11 here. In 2004, that's when Terysa gets into ROP. July 24th,
12 2009, is the punctuality memo. And it builds from there. She
13 meets with Lieutenant Rob Smith, and what does he say? "You
14 can't file an EEOC Complaint. I won't let you." He sits back
15 in his chair, put his arms behind his head, and said, "I sure
16 hope I'm getting some loyalty here." You saw Rob Smith. You
17 can picture that happening. What would he be worrying about?
18 Why would he care if she files an EEOC Complaint? Well,
19 because of what he had been doing to her that whole time.

20 She gets the warrant package July 29th after she's
21 complaining to Sergeant Hubbard and then to the lieutenant
22 about it and says that Hubbard gives her the packet on her own.
23 Well, she had received dozens of these in the past. There was
24 clearly a difference this time. You know, the City's trying to
25 make you believe that this was something made up or she could

1 simply just call for backup, but Hubbard's communication with
2 her at the time that he provided this warrant packet made clear
3 the way he felt, and Terysa saw that and experienced that and
4 testified to you about that.

5 Well, then she goes to see Commander Hudson, Smith's
6 still friend, and he says "Don't file an EEOC Complaint, just
7 apologize to Smith, fall on the sword, he's next in line to be
8 the commander, you're just going to have to go along, get
9 along."

10 You have the August 3rd incident. And again, ladies
11 and gentlemen, Terysa Welch had called for backup many, many
12 times. There had been delay in the past. But this time it was
13 different, and she told you why it was different and how it was
14 different. These individuals, Sergeant Hubbard, Kevin Gagne,
15 they were being hostile towards her. They were not going to
16 help her out. And this isn't a situation where Terysa was in
17 danger, somebody was attacking her. She was surveilling a
18 person that she wanted to arrest, and she was asking for help,
19 and it didn't come, and it was different this time.

20 She then files her EEOC Complaint. And don't forget
21 in between that time, the meeting on August 20th, that maybe
22 Kevin Gagne called, maybe J.R. Potter called, depending on
23 whose story you listen to, J.R. Potter's or Kevin Gagne's, it
24 got angry, got heated, Kevin Gagne slammed the door. Terysa
25 Welch told you that that -- that meeting was not a meeting

1 about folks trying to resolve their differences. It was Kevin
2 Gagne and Potter mining her for information, trying to find out
3 what's going on, continuing the hostility towards her.

4 After the EEOC Complaint is filed, Hubbard and Smith
5 are briefly removed and then they come back. They come back in
6 October, the end of October, beginning of November, and Hubbard
7 has the meeting where he says, and nobody disagrees with this,
8 "It was hard on me. It's going to be harder on you." And he
9 talked about some of these rules that he was starting to
10 enforce that were going to stay in place, that got issued
11 July 24th, some of them, especially the change to the arrest
12 log.

13 And Danny Garcia told you about that arrest log. He
14 told you how it was going to affect Terysa. The same way
15 Terysa told you it would affect her. It didn't have anything
16 to do with performance. It was a way to push Terysa out.
17 Right? The arrest log used to be ROP team, ROP team got this
18 guy, ROP team got that guy, but now it was going to change and
19 so it would just be the primary and the secondary detective.
20 And Danny Garcia explained to you in detail how that would be
21 different for a guy like him, who's getting all of his warrants
22 because he's liaison with Probation and Parole versus Terysa,
23 who's liaison with Burglary. It's just much, much different,
24 and it wasn't the team anymore. It's, Let's target Terysa.

25 And what did Danny Garcia tell you about that? He

1 said to these guys, "We don't want to do these rules; these
2 rules are no good. They need to change." And he was told the
3 rules stay in place until she leaves. There's your evidence of
4 why those rules were put in place.

5 Then you have the EEOC training on December 10th,
6 2010, with Sue Neal, and that's the training that by then Rob
7 Smith had already attended it, so the City wants to get up here
8 and say, "Well, we heard about the Complaint, we addressed the
9 issue, we took care of it, everything was fine, we had a
10 training." Well, one day later Rob Smith is trying to bull
11 Terysa over in the hallway. So how well did that EEOC training
12 really work? It was the only EEOC training of its kind. You
13 heard Sue Neal say she'd never given that training before. Her
14 job was primarily dealing with civilians. Her job was not
15 looking at EEOC issues with the sworn law enforcement
16 personnel, but she's asked to do this training, and supposedly
17 that fixed the problem.

18 And you heard from Terysa Welch that she told -- she
19 told everybody at SID that the EEOC training was punitive. She
20 hadn't done one like this. That wasn't her job. And why,
21 ladies and gentlemen, would Maureen O'Brien go to that
22 training, Maureen O'Brien, who had also filed that Complaint in
23 SID and felt mortified. We asked her "Is that how you felt?"
24 She said "Yes." If the training was everything was fine,
25 everything okay, what about it would make Maureen O'Brien feel

1 mortified?

2 And that's clearly not what happened. Even Sue Neal
3 got up here and said the feedback was great and everybody was
4 fine and they were attentive and they were interactive and, you
5 know, It wasn't to cover our butt, like Hudson said; it wasn't
6 to inflame the situation like Hudson said. Everything went
7 perfectly well. That was her testimony to you guys.

8 And then I showed her this, her e-mail to Beth Paiz
9 talking about Thursday's class, the December 10th class, the
10 one that Terysa went to, and said, "From what I heard and I
11 observed, it seems she's in a group full of hypocrites. It's
12 probably best that she leave, but those guys have issues that
13 her transfer won't fix."

14 Is that consistent at all with anything Sue Neal
15 tried to tell you in her direct examination about how that
16 class went? I mean, this is her examination of it. And when
17 Ms. Williams got back up and asked, "Well, what did you mean by
18 a group full of hypocrites?" Sue Neal could only come up with
19 one individual, not a group, that came up to her and said --
20 and bragged about not having to do the physical fitness. And,
21 you know, he looked out of shape. That was Sue Neal's
22 explanation for a group full of hypocrites. She cited to you
23 one guy that came up to her. That was not what she was
24 observing at the time she sent this e-mail.

25 And nobody ever asked her, "Well, what did you mean

1 by those guys have issues her transfer won't fix?" The City
2 just left that transfer unanswered. You-all can figure it out;
3 you can use your common sense.

4 She did this training, and these are the observations
5 that she made to Elizabeth Paiz just a couple of days later
6 about the SID individuals that Terysa Welch was having to deal
7 with. A group full of hypocrites, and they have issues that
8 her transfer is not going to fix.

9 We talked about the Rob Smith hallway incident in
10 December 11, 2009. I'll show you in just a minute she
11 immediately contacted Deputy Paiz and told her about it. Paiz
12 was concerned about her safety, immediately told Terysa not to
13 go working that night, and then, remarkably, Elizabeth Paiz
14 said now that she didn't believe that incident even happened.
15 She said she thought, well, Smith was on his way out, it's a
16 Friday night, yet she's telling Terysa don't go to work that
17 night because she knew there was some operation going on.

18 And so I asked Beth Paiz, well, you know, you must
19 have looked into this to determine it didn't happen or it was
20 made up. Well, she didn't ask Rob Smith about the incident,
21 didn't ask anybody else was Rob Smith there that night, didn't
22 check his time sheets, and just assumed that it didn't happen.
23 That was her feeling now when she testified about it.

24 And these are the notes that were actually taken at
25 the time that this was going on. December 4th when she first

1 talks to Terysa and Terysa says right here, "She told me she
2 was not having a good time and she hated to go," hated to leave
3 the ROP unit. That was Terysa's feelings on December 4th.

4 On December 7th, she was considering a TDY, a
5 temporary move because, hoping that this thing would be worked
6 out.

7 December 11th, she reports what happened in the EEOC
8 training. And don't forget the meeting that Sue Neal had with
9 Joe Hudson in which Joe Hudson was hostile -- excuse me-- that
10 Paiz had with Joe Hudson in which Joe Hudson was hostile to
11 Beth Paiz, was rude to her, was rolling his eyes. And these
12 are the things that you have in Exhibit 4 that shows you
13 exactly what was going on at the time.

14 Again, just a month later after she moves her out of
15 ROP for her safety, she's talking about Joe Hudson and Hudson's
16 still not happy. She meets with the ROP team February 1st,
17 2010, Gagne, Wyckoff, Potter, Hill, Hubbard, Stephensen, and
18 Smith, at the ROP office. That's what she wrote in her notes
19 and said they were uncomfortable about her returning to work.
20 Well, remember Wyckoff and Stephensen were new. They just came
21 to the unit. How are these guys uncomfortable about Terysa
22 Welch being there if they hadn't been told something by the
23 other individuals? It just doesn't make sense. They wouldn't
24 have any reason to be uncomfortable.

25 And then nothing happens until July 9th, 2010, where

1 the issues have still not been addressed within the ROP unit.

2 So, ladies and gentlemen, this is an involuntary
3 transfer, and, as I told you earlier, the transfer was
4 discriminatory and the transfer was caused by the sexual
5 harassment. And why was it an adverse employment action, which
6 is required for discrimination, it's not a requirement of the
7 sexual harassment claim, but it was an adverse employment
8 action because she lost wages. Burglary was different. It was
9 slower paced. Although Terysa did a good job in Burglary, she
10 expressed her desire to go back to ROP, and ROP clearly has
11 more overtime hours. The evidence was undisputed as to that.
12 It's more prestigious, there's flexible hours, you get
13 specialized weapons, it's looked up to by everybody in the
14 Department.

15 Danny Garcia was telling you, when the SWAT guys and
16 Homicide guys say they want to be like you, you know that's
17 something special. And it's in the Special Investigations
18 Division, which is different than all the other divisions, and
19 Burglary's not. That transfer was an adverse employment
20 action.

21 We talked about Kevin Gagne. I won't go back over
22 this at length, but again, his hostility towards Terysa Welch
23 was never really contradicted, and you got an idea about what
24 Kevin Gagne's character was like from his testimony and the
25 things that he said.

1 Now, I want to talk to you briefly about this memo
2 that Kevin Gagne got. Remember, it came up in Exhibit C. He
3 gets a memo August 17th, 2009, about punctuality. Well, this
4 is right after Terysa had complained all the way up to the
5 chain of command. So do you think Sergeant Hubbard is sending
6 this memo to Kevin Gagne because he wants Kevin Gagne to get
7 his act together or he wants to cover himself?

8 We talked about J.R. Potter and his credibility, and
9 you-all got to see his credibility yesterday, but he said
10 things like -- about this fake boob job, about these pictures
11 that Terysa supposedly was showing him, about her looking on
12 the computer for lingerie. Did anybody else come in here and
13 testify to that? Did anybody support J.R. Potter's story?
14 None at all. If that was the case, if that really happened, if
15 that's the way Terysa really was, you would have expected to
16 have heard that. Not a single other person said anything, save
17 Rob Smith, about Terysa in any way reciprocating this behavior
18 to J.R. Potter or Rob Smith.

19 Now, the discipline, we talked about this at length,
20 but I want you to keep in mind, August 2010, these guys are all
21 interviewed by the EEOC, both Kevin Gagne and Doug West, and
22 just two months later Kevin Gagne's the one who reports Terysa,
23 and Doug West orders the IA and then later recommends her
24 termination. You've got the evidence right in there.

25 Chief Feist looks at this and says, "Well, yeah, I'll

1 sustain that there were these three violations all related to
2 transporting alcohol, but I'm not sustaining this other stuff,"
3 and he reviewed the interviews in the IA, he reviewed what
4 Terysa said, and that was his conclusion. She didn't lie; she
5 wasn't hiding anything.

6 Now, the City's going to say, well, Mr. Marquez and
7 Mr. Laskar, who got much less discipline, they only had one
8 policy violation. But the three policy violations that are
9 sustained in here are all for the same thing: Transporting
10 alcohol. You can't transport alcohol, can't violate the rules,
11 can't use your take-home car to transport alcohol. It's all
12 the same thing. And just because Mr. Laskar and Mr. Marquez
13 didn't get that same treatment doesn't mean that somehow this
14 is different. They went after Terysa with more than one
15 violation because they were out to get her.

16 And Chief Schultz's recommendation, which I told you
17 about, that's Exhibit 103, he gives a suspension for 16 hours.
18 He doesn't give a 40-hour suspension. It's 16 hours, and 24 is
19 held in abeyance. That's the final discipline. And all he
20 sustains is that she violated the transporting alcohol. He
21 doesn't sustain that she lied or interfered with an
22 investigation or did anything like that. And he knew that his
23 policy was a 40-hour suspension and you get reported to NMLEA,
24 yet he only gave her a 16-hour suspension. He got to decide
25 what the final punishment was.

1 He didn't follow the chart of sanctions. The chart
2 of sanctions was clear that it's a written reprimand, it's not
3 an 16-hour suspension, but that's what he imposed, and that's
4 plain and simple, different than what Nick Laskar and Gene
5 Marquez got. You have to ask yourself, why would Terysa Welch
6 get a different punishment than Nick Laskar and Gene Marquez?
7 What's the main difference? She complained about her treatment
8 as a female, she was a female, and this is what happened to
9 her. These other guys, Nick Laskar and Gene Marquez, they
10 didn't have that situation going on, and that's the only
11 difference, ladies and gentlemen.

12 And then they send her to NMLEA. You know, Chief
13 Schultz, he's a smart guy. He's obviously not going to follow
14 Doug West's recommendation for termination. He knows how that
15 looks. So he limits the discipline, yet this letter still gets
16 sent to NMLEA because the NMLEA could revoke Terysa's license.
17 Now, it's not up to Chief Schultz if they revoke the license,
18 but that's what could happen. And in there they accuse her of
19 this first one, personnel shall obey and to the best of their
20 abilities protect the rights of the people as provided in the
21 Constitution. And that was never even an issue in any of her
22 Internal Affairs investigation. So why would they accuse her
23 of that if it's not true? Why would they send that to the
24 NMLEA? They also said that she -- personnel shall not
25 knowingly interfere with an investigation. Yet Chief Feist

1 didn't sustain that, and neither did Chief Schultz, but this
2 got sent anyway to the NMLEA. Why would that happen? Why
3 would they do that? It clearly would damage the reputation of
4 Terysa Welch.

5 This is the law enforcement board that holds her
6 certification. What's the -- What's the only reason that you
7 can think of that they would do that? Because of who Terysa
8 Welch was, because she's a female, because she's complaining
9 about her treatment as a female. There's no other explanation
10 for this, ladies and gentlemen. There's no other reasonable
11 explanation for it.

12 So I want to talk to you about the damages. And
13 again, this is my suggestion to you. There isn't a
14 mathematically precise formula. But there is associated with
15 this discipline and the process that she went to -- went
16 through, emotional distress, loss of enjoyment of life, and
17 damage to reputation. And so I've suggested \$50,000 associated
18 with that whole disciplinary process for these nonspecific
19 damages. And again, this can also be considered part of the
20 harassment as well as sex discrimination damages.

21 And then the damage to reputation, which I think is
22 really different from emotional distress and loss of enjoyment
23 of life. And what is that damage to reputation that she was
24 experiencing? Well, the NMLEA has a permanent letter in her
25 file. That's in evidence. Jason Bowie, her husband, gets

1 asked by his own chain of command "Did she lie in the IA?"
2 That's how far the damage to representation spread, ladies and
3 gentlemen. And I think that that is worth in and of itself the
4 additional monetary amount of \$50,000. Now, remember, you are
5 the voice of the community. You get to decide. These are my
6 suggestions to you.

7 And then there's the damages that clearly are
8 associated only with sexual harassment. The time period from
9 when Rob Smith is the sergeant, 2004 to 2006, he's with her
10 every day, it's the most intense period of time where she's
11 experiencing his sexual harassment and behavior, and so we take
12 a two-year period and suggest \$25,000 per year for that
13 two-year period to \$50,000.

14 Now, in 2007 to 2009, he's a lieutenant, and so he's
15 not around as much. It's still happening. We have the David
16 Maes incident, and so for that two-year period, because I think
17 of the David Maes incident, we're talking about the same dollar
18 amount, \$50,000.

19 And then in 2009, of course you have the transfer and
20 everything that happened during that really intense time
21 period, and that's where you heard about the testimony of her
22 emotional distress. She suffered weight loss, she had sleep
23 problems, her migraines increased dramatically. And
24 Dr. Foote's testing that he did of her demonstrated that she
25 was suffering from these psychological problems.

1 So, we add up the total amount. We have the lost
2 overtime. \$27,693 is what Dr. Brian McDonald testified about.

3 So break it down in this fashion. We come up with
4 the \$150,000 for sexual harassment, \$100,000 associated with
5 the discrimination. Although keep in mind that there's
6 crossover between harassment and discrimination. The lost
7 overtime gets you to a total of \$277,693.

8 Again, we trust this to you, ladies and gentlemen,
9 and what I would ask you guys to do when this trial is over, is
10 look at the elements of sexual harassment. Remember that there
11 are two that you have to examine: Supervisor and coworker.
12 The City's defense that it properly -- when it found out about
13 the coworker harassment, it addressed it, is only for
14 coworkers. Not supervisors. They don't get that defense for
15 supervisors.

16 And then discrimination. Find that the City is
17 liable for all three, and then fix an amount of damages. And
18 the Special Verdict Form that you-all are going to get will
19 help you break out the damages for each amount, emotional
20 distress, loss of enjoyment of life, damage to reputation and
21 that sort of thing, and reach a verdict in favor of Terysa
22 Welch.

23 Thank you.

24 THE COURT: All right. Thank you, Mr. Villa.

25 Ms. Williams -- And before we get started with

1 Ms. Williams, we will take another break. So please rise for
2 the jury.

3 (Jury out at 10:29 a.m.)

4 THE COURT: All right. Mr. Villa, of your 75
5 minutes, you have 25 more minutes.

6 MR. VILLA: Yes, Your Honor.

7 THE COURT: Okay. Everybody has equal time.

8 All right. We'll be in recess.

9 (Court stood in recess at 10:30 a.m. and resumed at be
10 10:40 a.m. as follows:)

11 THE COURT: Please remain standing.

12 Mr. Villa, can you roll through your rebuttal --

13 MR. VILLA: Yes, Your Honor.

14 THE COURT: -- after Ms. Williams without having to
15 take a break?

16 MR. VILLA: Yes, Your Honor.

17 THE COURT: Are you ready?

18 (Jury in at 10:40 a.m.)

19 THE COURT: Okay. Please be seated.

20 Ms. Williams.

21 MS. WILLIAMS: Thank you, Your Honor. May it please
22 the Court?

23 THE COURT: Counsel.

24 MS. WILLIAMS: Ladies and gentlemen of the jury, we
25 know you all had other obligations during your time that you've

1 been here. The City of Albuquerque appreciates your service.
2 Ms. Wiggins, Mary Scott, Beth Paiz, and I also appreciate your
3 service.

4 When you were impaneled, you each raised your right
5 hand and swore that you would render a true verdict in
6 accordance with the law and evidence submitted. In the past
7 six days, you've heard evidence and you were instructed by the
8 law -- by Judge Gonzales on the law this morning. You've been
9 charged with an important task, and you have the power to
10 ensure that justice is served in this case. The City trusts
11 you will do the right thing.

12 Plaintiff's counsel are effective advocates, they're
13 fighting hard for Lieutenant Welch. They don't really want me
14 to talk to you. This is my one and only chance to talk to you
15 before you deliberate. Mr. Villa gets another chance, and I
16 will not be able to correct any exaggerations or misstatements
17 as I have been doing in the course of the trial through
18 objections. I'm asking you to be the guardians of the facts
19 and evidence during rebuttal. You heard all the evidence, and
20 you can interpret it yourselves.

21 The issue you are here to decide is whether the City
22 sexually harassed or sexually discriminated against Lieutenant
23 Welch because she's a female.

24 Let's start with something clear-cut. It's
25 undisputed that Lieutenant Welch filed this lawsuit; that since

1 she's filed this lawsuit, that the City has promoted her two
2 times. It's undisputed that she has not lost a cent in her
3 wages or benefits. The losses that they're saying that she has
4 are strictly and narrowly put into an overtime category. It's
5 undisputed that she has the burden of proving that it's more
6 likely than not that the City created a hostile work
7 environment for her because she's a woman. This is simply not
8 true.

9 Not a single witness on that stand ever said they
10 observed her being harassed or discriminated against because
11 she was a woman in the workplace. You heard every single
12 witness.

13 Now, Terysa Welch joined ROP in 2004. That's the
14 date of the physical assessment note, as well. That note does
15 not come to light for five years. In July of 2009, with her
16 pen and her silence, Lieutenant Welch began to undermine the
17 ROP team's values. She started writing comments, notes on her
18 coworkers, who was late, who was not on time, who wasn't where
19 they were supposed to be, and other things that she perceived
20 to be shortcomings of her coworkers.

21 She created an atmosphere of mistrust and animosity
22 among her team by keeping those notes on her teammates and
23 refusing to communicate with them. They noted she was taking
24 notes. It disturbed them. They asked her to talk to them
25 about what was prompting that change in behavior for her, and

1 she told them "None of your business." That response in this
2 atmosphere creates a danger to everyone on the team, including
3 Lieutenant Welch. So it's not something that they could
4 tolerate, and it's not because she's a woman. It's because of
5 her behavior and because of a change in behavior. We don't see
6 notes like this from 2004 or 2005 or 2006 or 2007 or 2008. The
7 problems in the team start when she starts documenting
8 shortcomings of her coworkers.

9 Her psychologist said that could create mistrust
10 among a team. She's not willing to admit that that could
11 create mistrust and a different atmosphere among your
12 coworkers.

13 You've seen excerpts of this book. It's Exhibit A,
14 which will go back to you in your exhibits. And they include
15 her criticisms. Yet she didn't talk to these detectives about
16 her perceived deficiencies that she chose to document.

17 She stopped greeting certain people. She shut down
18 communication with teammates. You heard from several witnesses
19 that ROP had a philosophy of -- consistent with APD culture, of
20 trying to resolve differences at the lowest possible level.
21 And that's at the team level, where you go to the person and
22 you say, "Why didn't -- Why are you doing that?" whatever it is
23 that's bothering you, and hopefully that can get done.

24 After about a month of this note-taking behavior,
25 Potter and Gagne and Hill had a meeting with her, and we just

1 talked about that, to see if they can work through her problems
2 and communication problems that they saw developing. It was a
3 short meeting. It was a frustrating meeting.

4 Terysa Welch would not open up to her team. She
5 maintained her silence, widening the breach of trust between
6 her and her teammates. It had nothing to do with her gender.
7 It had to do with her pen and her silence.

8 At this point, she's creating doubt in the minds of
9 her teammates on whether they could operate safely and protect
10 each other. J.R. Potter told her, "Are you going to be able to
11 cover me if we can't communicate?" And that issue was not
12 resolved at that meeting. Because, after all, these team
13 members each hold each other's lives in their hands. Good
14 communication is an officer-safety issue, and no one was
15 feeling safe in the midst of the silent treatment and
16 note-taking. Not a single officer, regardless of gender, felt
17 that this was a safe environment in July of 2009.

18 Terysa Welch testified she didn't believe documenting
19 her colleagues' comings and goings and shortcomings could be
20 perceived as eroding their trust, but the others felt that.
21 They said it did. And that's for you to decide.

22 She testified that she openly criticized her
23 teammates' weight and insisted that they get into shape or be
24 transferred regardless of their value to the ROP team. She was
25 proven that there were serious personality conflicts in the ROP

1 team and that she was not interested in working through those
2 conflicts. She had some people she liked to work with. You
3 heard the formation of some cliques, and that is a destructive
4 team environment, whether it's a football team or whether it's
5 a police team.

6 Lieutenant Welch wanted a homogenous group of fit
7 people to work plain clothes with her. You heard Rob Smith and
8 Dave Hubbard testify that you need all sizes and shapes to work
9 effectively in a plain-clothes unit that sometimes goes
10 undercover. You need people that repeat offenders will not be
11 alerted to. You need the people of Walmart, and as one of
12 them, we can't all run very fast.

13 She's proven that her workplace felt hostile to her
14 because her coworkers did not respect her abilities as a
15 detective and this change in behavior. She did not prove that
16 this change was due to her gender. She testified she could not
17 buy respect in ROP. She told her psychological forensic
18 psychologist that. We all know that you don't buy respect.
19 You earn it regardless of gender.

20 You heard that she was reliable backup, that she came
21 on callouts. You did not hear that she was a go-getter. In
22 fact, Danny Garcia said she was not a go-getter. You did not
23 hear that she developed confidential informants and
24 apprehension techniques, that she gathered intelligence to
25 locate repeat offenders, that she built her own cases or made

1 arrests in her own cases. She was good backup.

2 She's proven that she worked in a high-stress
3 environment in which her coworkers and their use of dark and
4 sometimes rough humor was used to alleviate the tremendous
5 stress they all worked under.

6 The testimony was that she was a willing participant,
7 that she had jokes, that she joined in. She never told
8 coworkers that they had gone too far with the jokes or comments
9 and that they needed to stop.

10 You heard Sue Neal describe in the EEOC training
11 something called crucial confrontation, where someone who feels
12 that they're being harassed has an obligation to confront,
13 plan, initiate, negotiate, and evaluate so the behavior stops,
14 stops in its tracks, and she never did that with anyone
15 regarding any of the things that she perceived as sexual
16 harassment and that others might have perceived as jokes,
17 however tasteless, however rude they perceived them as jokes.

18 Lieutenant Welch had a catalog of things she
19 perceived as sexual harassment. You saw it on Mr. Villa's
20 list. He just recounted them. The first is the thing that he
21 opened with her in his opening argument, Exhibit 166, the 2004
22 assessment. You've seen it with almost every witness. There's
23 a note on that that has been discussed. Rob Smith said he
24 thought it was a joke. This was before she was on the ROP
25 team. So it is interesting to me how if that happened before

1 she was on the ROP team, why she came to the ROP team and did
2 not address it and shut that down immediately. That assessment
3 is what it is. You've heard testimony from everyone about Rob
4 Smith's comments and joking humor, and a way that he
5 complimented somebody was saying "I want to have your baby" or
6 things like that. Maybe tasteless. Never was told it was
7 sexual harassment, because he was unaware that this was a
8 problem for five years before it came to light.

9 The other is Exhibit 167, the Sip and Shop fundraiser
10 for domestic-violence victims article in which Rob Smith was a
11 model in a fashion show tea. You've heard testimony that when
12 he said "T - Thanks for the memories heart Rob" he was joking,
13 that he was autographing an article that was in her cubicle and
14 that had been scattered around the SID offices. Some people
15 testified that Terysa Welch and Mike Hill put those up, and
16 some people did not know. Rob Smith did not know. But even
17 Terysa Welch said that these two notes somewhat crossed the
18 line. She wasn't even prepared in her examination to say that
19 she considered them to have crossed the line.

20 So we have two notes. You have to decide if these
21 were gender-based sexual harassment or jokes that didn't hit
22 the mark. Were they meant to harass Lieutenant Welch or were
23 they jokes or compliments among team members?

24 Lieutenant Welch testified that she heard three or
25 four penis jokes between Rob Smith and J.R. Potter in the nine

1 years that they worked together. They admitted that they told
2 those kind of jokes three or four times in nine years. She did
3 not testify that they were directed toward her. They testified
4 that they were not directed toward her, and they might have
5 been said within her hearing. What is important is she did not
6 confront them, set expectations, and tell them to stop.

7 It appears that they were not unwelcome, these things
8 that have happened that she is complaining about today and
9 calling sexual harassment or sexual discrimination.

10 You heard Sue Neal explain the expectation in APD for
11 a person who feels harassed, that they have an obligation to
12 stop that. Now, if they can't do that, there's also a safety
13 valve. They can go to anyone in APD or in the City. The City
14 HRD, the APD HR department, up her chain of command, the City's
15 EEOC internal office, the -- She has a multitude of options
16 within the City that she does not take advantage of.

17 She then says -- So we have two notes, we have three
18 to four penis jokes, and she says that when Rob Smith informed
19 her that her fiancé was arrested for rape, that he hugged her
20 too tightly, that he held her hand when he was telling her that
21 awful news, and he offered to take her home to get her animals
22 and her things, and that he called her daily to see how she was
23 doing when she decided that she needed to go to Montana. She
24 describes these things to be harassing and she describes them
25 to be sexual in nature.

1 She describes his calls as a sergeant checking up on
2 her because she has experienced something devastating to be
3 creepy. And you saw Rob Smith. He may be juvenile. You've
4 seen his jokes. But he is not creepy. It's up to you to
5 decide if these efforts to comfort one of his subordinates was
6 gender-based harassment or a concerned sergeant looking out for
7 the well-being of one of his subordinates.

8 I understand the lens that Lieutenant Welch was
9 viewing this through. She'd been betrayed by the man that she
10 was going to marry. Her paid forensic psychologist, Dr. Foote,
11 agreed that this kind of betrayal could cause a woman to begin
12 to mistrust men. It could cause a woman to mistrust male
13 police officers. This may be the genesis of the trust issues
14 with her teammates and Lieutenant Welch.

15 Lieutenant Welch also said Rob Smith joked that he
16 would be interested in pursuing her if he was not married. She
17 would reply "Next life." There is no indication that she
18 didn't welcome that kind of back-and-forth banter between her
19 teammate Rob Smith and herself. She didn't tell him to stop
20 that, that she didn't appreciate that; that it was something
21 that she considered to be sexual in nature instead of kidding
22 around. She knew he was happily married and never told him to
23 stop that.

24 The harassment has to be unwelcome. If you
25 participate, if you do not object, if you seem to be engaged,

1 the person that you think is harassing you does not have a
2 message that you think it's inappropriate and needs to stop.
3 And under the law, unwelcomed harassment is not illegal.

4 You have to decide if that would lead him to believe
5 that he was interested in her sexually or if they had a running
6 joke.

7 It's undisputed that she never told Rob Smith she was
8 offended by anything he said. She never told him to stop.

9 She also describes his Viking story as something that
10 she thought was harassing. You heard the story. She
11 participated in the exchange. You have to decide if he was
12 kidding, if he was entertaining, or if he thought that he
13 wanted her to be breeding stock to have a bigger family line.
14 If his wife is small, Lieutenant Welch is tiny. If he had that
15 conversation with me, I'm a big girl, we may have talked about,
16 you know, breeding up a line, but this has to be kidding
17 because the thing wasn't true. There was no way that his
18 great-great-grandfather Viking was going to get taller
19 great-great-great-grandkids if he bred with someone tiny. It
20 had to be a family history, something to pass the time, and she
21 played along. She said, "If we had had kids, they'd be bigger
22 and better looking." And he brought that on and decided, okay,
23 that's -- that's her opinion about that. "I opened that door,
24 and I'm willing to accept her opinion on that."

25 You need to decide if that was a proposition for sex

1 or not. We submit it is not. The circumstances are not
2 sexual. It's on the -- It's at the Academy. There's plenty of
3 people around. It's not a sexual comment. It's a family
4 history kidding around, entertaining exercise.

5 Lieutenant Welch said she did not report the incident
6 because she didn't want to hurt Rob Smith's tiny wife Shannon.
7 Rob Smith testified that he calls his tiny wife Shannon a
8 munchkin, a midget, a pygmy, all kinds of things, that that's
9 part of their loving, joking-around relationship. And I think
10 that he thought that that was the kind of relationship he had
11 with his coworker for the past several years through Northeast
12 Impact and through ROP, that he could kid around with
13 Lieutenant Welch because they were comfortable in that
14 relationship.

15 How is he to know that she was going to be offended
16 by the recounting of a family story?

17 So those are the things that we have that he's
18 described as sexual harassment. Two notes, three or four
19 off-color jokes, comforting her when her fiancé was arrested,
20 and a Viking story. Six things, seven things if you add "I --
21 I think you look good; if I wasn't married, I would think about
22 going out with you." Seven things. We're looking at a time
23 frame of nine years. We have less than a comment a year that
24 she's finding offensive, and in that period of time she reports
25 none of those until after she gets the punctuality memo.

1 Judge Gonzales instructed you that the harassment has
2 to be unwelcome. If a woman joins in the exchange, it
3 indicates the exchange is not unwelcome. If a woman does not
4 set a boundary and say "stop," her coworkers can surmise she's
5 not offended and is a participant in the joking and horsing
6 around.

7 Lieutenant Welch has to prove that these seven
8 instances of sexual harassment that she's described to you were
9 severe and pervasive. We all know what severe means. It means
10 extreme. Right? A severe headache is an extreme headache;
11 severe weather is severe weather. Pervasive is a little more
12 less dictionary definition. And the way I look at it is if --
13 have any of you ever been in an area where a skunk has been
14 frightened? That pervasive means that it's present everywhere,
15 like that skunk smell, if you've had a skunk be frightened, is
16 in the area, you cannot escape it. You cannot leave this
17 pervasive, all-encompassing harassment. We do not believe that
18 she has proven that there was an extremely bad harassment
19 problem everywhere in her workplace through any other witness,
20 including herself.

21 The law given to you by Judge Gonzales is that an
22 offhand comment or rudeness or teasing or an isolated event is
23 sufficient to constitute sexual harassment. Seven events, nine
24 years is not pervasive or severe.

25 Severe also goes to did the person grab you, did the

1 person kiss you, did the person touch you. And those are in
2 the instructions as well, and I'm sure you'll look at those
3 carefully as you paid attention through the course of this
4 trial.

5 Lieutenant Welch was treated like the other
6 teammates. They discussed workouts, they discussed diets, they
7 discussed whether they were working or not, the diets and
8 workouts, what results they were getting, are you getting
9 better arms, are you getting better abs, those kind of things.
10 Danny Garcia said they talked about that all the time, he and
11 Rob Smith; that Rob Smith would compliment him, compliment his
12 body parts, "Your arms are looking good, Mr. Garcia." So he
13 was given the same type of conversations because they were
14 common in ROP. There's a culture of fitness for some of those
15 people, and diet, exercise, and body are important when you're
16 talking about fitness.

17 They also complimented each other's clothes because
18 they work together all the time. I don't know about you, but
19 if Ms. Wiggins gets a new shirt, I know it, and I will tell her
20 that I like it or not, and I don't -- I don't believe that's
21 sexual harassment. It not pervasive, it not severe. It's
22 offhand, and it's not sexual.

23 You've heard she joked about boob jobs, that she
24 sought advice from J.R. Potter regarding Victoria's Secret
25 purchases, and she showed a naked photo of someone on her

1 phone. He didn't see that as sexual. They've worked together
2 for years, more than eight years on the ROP team. They worked
3 together for years at Northeast Impact. He was the person she
4 called when she needed someone to have her back, when she was
5 breaking up with her boyfriend Abel Aragon, and he came and was
6 present for her. They were close friends, the kind of friend
7 that you would say "Would this look good on me?" The kind of
8 friend that you would ask "Here are my pictures from my Vegas
9 trip." And that doesn't mean that their interactions were
10 sexual.

11 What we have evidence of is that she was right in the
12 middle of the smokin' and jokin'; that she was not someone who
13 needed to be treated differently or with kid gloves. They
14 treated her like one of the team.

15 Now, we're going to back up because the problem with
16 the -- the problems all come out in July of 2009. In 2004 when
17 Lieutenant Welch came to the ROP team, she was the only female.
18 She was the only female who tried to get on the ROP team. She
19 wasn't the only female that had ever been on the ROP team.
20 There had been at least two before. But she highlighted her
21 gender to her teammates. Rob Smith wanted a woman on the team.
22 He had seen how effective having a woman on a plain-clothes
23 team, where you're trying to arrest people and get close to
24 them without them startling and alarming, that a woman was a
25 huge asset in being able to do that. He explained, if you see

1 a gang of fit-looking guys walk into a park, bad guys go on
2 alert. If you see a couple walk into a park, bad guys go about
3 doing what they're doing, whether it's a barbecue that you're
4 trying to get close to them and arrest them during or whatever.

5 And she was selected for that job. Rob Smith wanted
6 her in that job. And it was underlined in there. He did not
7 want her as a sexual partner. There's no evidence of that. He
8 wanted her because he thought she was an effective asset to
9 that team that he was trying to build to match his vision of
10 what the ROP team could be when he became the sergeant.

11 She was obviously proud of being a woman in a man's
12 world, and that's okay. She should be proud of that. It's an
13 accomplishment.

14 She had a pink lunch box, she had pink shirt, made
15 with the noose emblem on it, and she heard Rob Smith tell some
16 grumbly person, she testified, that she'd earned her spot, that
17 she was going to be there, and that if that person didn't want
18 to stay, they could leave.

19 We have two comments that go back to this 2004 time
20 even though they were not disclosed until 2009. One of them is
21 that Dan Wolfe, who was a person who retired about a month
22 after Lieutenant Welch joined the ROP team, said there's no
23 chicks in ROP. And he was gone because there was going to be a
24 woman in ROP. Rob Smith wanted a woman in ROP. Rob Smith's
25 vision of how the team was going to work needed a woman in ROP.

1 The other is a comment that is hotly disputed.
2 Lieutenant Welch said she learned that in 2009 someone, John
3 Sullivan, a sergeant in Burglary, told her -- this is how
4 hearsay works. John Sullivan told her that Kevin Gagne had
5 told him that he got F'd and he didn't want to a skirt in ROP.
6 He says that never happened. You can -- You don't get to judge
7 the credibility of John Sullivan because he wasn't here to tell
8 you what he heard, the context or when he heard that. But you
9 did get to see Kevin Gagne, and Kevin Gagne flatly denied that
10 he said that. He said he wanted a woman in ROP. He just
11 didn't want this woman. He had someone else that he thought
12 was a better candidate. The problem for him, he's a detective,
13 he doesn't get to choose. And when Terysa Welch and Mike Hill
14 were the people that were chosen in ROP, he said he was
15 welcoming to them. He described incidents where he gave her
16 equipment that she did not have and that he helped her out with
17 a radio frequency so that the other team members didn't give
18 her a hard time. He describes that he was welcoming to her and
19 tried to help her find her way there.

20 Something you need to probe is why did she wait five
21 years to complain about the note on her physical assessment?
22 Why did she bring up the "We don't want a skirt" comment five
23 years after it apparently was made, and that she brought up the
24 "We don't want chicks in ROP" comment five years after they
25 were made? That's a long delay. It's not weeks. It's not

1 days. It not months. It's years, half a decade. That's a
2 long time.

3 Why did she wait five years to complain about those
4 things? Why did she let it fester if it bothered her, and it
5 did not bother her until she got the punctuality memo and she
6 had it in her pocket to use it offensively?

7 Rob Smith absolutely supported her selection in ROP.
8 He made it clear that a woman detective was going to be in that
9 unit and that it was going to be this woman.

10 The evidence was that Lieutenant Welch eventually
11 developed personality conflicts with several ROP team members.
12 She never liked Gagne. She said he never liked her. The
13 evidence was he tried to help her out. She didn't like J.R.
14 Potter because he was fat. She was unhappy with Detective Hill
15 because of his relationship with her sister-in-law. She didn't
16 like Hubbard or Smith because they didn't follow the rules. So
17 she was developing personality conflicts, and it's your job to
18 decide whether Lieutenant Welch's sex had anything to do with
19 the development of those personality conflicts in the unit or
20 in her work environment, those decisions that were made
21 regarding her assignments to Burglary and ROP and whether she
22 was moved, TDY'd because of her gender instead of because of
23 personality conflicts or behaviors or because she requested it.

24 You heard Beth Paiz describe a call that she got from
25 Lieutenant Welch that said she didn't feel safe in the unit.

1 She had been probing that issue. She asked her a couple times
2 "Did you feel safe?" And when she said she didn't, she asked
3 her "What do you need?"

4 Now, Beth Paiz eventually testified that she made the
5 determination that the hallway event didn't happen the way that
6 Lieutenant Welch described it. Sergeant Smith doesn't even
7 remember that, passing her in the hallway. In fact, he thinks
8 he didn't pass her in the hallway because he had been ordered
9 to avoid her. But what's important is Beth Paiz assumed the
10 incident did happen and took the action that Terysa Welch asked
11 her to take, which was to move her TDY up two weeks so that she
12 could be out of ROP. That's what's important. Paiz acted as
13 if the incident happened and reacted appropriately, to move
14 Lieutenant Welch, who she believes perceived the incident the
15 way she described it.

16 Beth Paiz has notes, Exhibit 4 in your book, that
17 you've been over them. You can look and see. She documented,
18 because she knew that Terysa Welch was documenting things and
19 that she would need her notes in case something like this trial
20 happened. So she kept notes at the same time. And you can see
21 if the notes overlap or they're accurate between them.

22 Lieutenant Welch is claiming she was discriminated
23 against when she was not appointed Acting Sergeant. She had
24 less seniority than the other people who were upgraded. The
25 testimony's undisputed about that. Gagne, Hill, and sometimes

1 Potter. Gagne had more seniority in the unit and on the force.
2 Hill had been a lieutenant in Carlsbad before he came to APD,
3 and Potter had more seniority on the force, and she had more
4 seniority in the unit. She's not proven a connection between
5 her sex and being appointed or not as Acting Sergeant, and
6 that's for you to decide. Was it the sergeant's feeling that
7 some other person could do a better job or he didn't appoint
8 her because he didn't want a girl in charge?

9 Danny Garcia is also a male, and he testified he was
10 never appointed Acting Sergeant either. It's not a
11 gender-based decision. There were other factors. And you
12 heard Hubbard and the others testify that they appointed who
13 they thought could take charge and do what they needed to have
14 done.

15 Lieutenant Welch took the sergeant's process to be
16 promoted. She testified that she failed it the first two
17 times. The time that becomes critical for us is not the first
18 time she took it, but the second time she took it. She's
19 claiming that it was discriminatory for her to have to write a
20 letter for exemption because she had discipline within the
21 period of time in which there was described to be no
22 discipline, but you could get a letter from the Chief if you
23 wrote a letter to him to get permission to take the exam. She
24 did that. He allowed her to take the exam. Unfortunately, she
25 didn't pass the written portion of the exam. And the testimony

1 was that there was no ability for anyone in her chain of
2 command, from the sergeant through the Chief of Police, to
3 manipulate the process and affect the outcome of that exam and
4 make it so that Lieutenant Welch failed that exam. That simply
5 didn't happen. Bad luck. She, for whatever reason, didn't get
6 a high enough score to go on to the Assessment Center.
7 Luckily, she did the next time, and she was promoted to
8 sergeant since this lawsuit was filed.

9 She then took the lieutenant's exam, and she has
10 since been promoted to be a lieutenant. Both of those issues
11 go directly to one of the elements of damages that's before
12 you.

13 You are to consider whether there was a loss of
14 reputation in the Department, in APD specifically, based on her
15 gender and based on the fact that she was transferred because
16 of her gender. So you have to have like a two-part analysis.
17 Was she transferred because of her gender, and then did she
18 lose reputation in the Department because of her gender? The
19 fact that she's promoted twice since she was transferred is
20 evidence, clear evidence that her reputation in the Department
21 did not suffer; that she was highly thought of; that she was
22 promoted to sergeant, she was promoted to lieutenant where she
23 sits today.

24 You also note for loss of reputation, you didn't hear
25 a single witness, not one, tell you "I used to think really

1 highly of Lieutenant Welch, but after she got transferred to
2 Burglary, that really changed my opinion. I thought less of
3 her." No one said that because no one had their opinion change
4 because she TDY'd to Burglary or any other thing that she's
5 claiming the City of Albuquerque did to her. She has not
6 suffered a loss of reputation. You can't compensate her for
7 the loss of reputation. Didn't happen.

8 Now, she also says that she was disciplined because
9 of her gender. She was disciplined because she transported
10 alcohol in a City vehicle, was observed by someone else, and
11 went to the IA investigation and said she could not remember
12 doing that. That is a completely different scenario than the
13 other two gentlemen who came in here. Gene Marquez was in
14 Field Services. He did testify that he didn't know how things
15 were done in SID regarding discipline, but he said, "The minute
16 my sergeant said 'Did you buy alcohol and take it in your
17 car?'" he said, "Yes, I did," and that was the end of that.
18 His sergeant said, "Don't do that again." He said, "Yes, sir."
19 And that was the end of that investigation into his purchasing
20 of alcohol and transporting it in a car.

21 Nick Laskar also purchased alcohol and transported it
22 in a City vehicle. He also, when he heard from his sergeant
23 that he had been reported, immediately said "I did. Here are
24 the texts. I bought it as a Christmas present. I'm taking it
25 to my friend. I am sorry, I will not do it again," he

1 confessed immediately. He submitted to the discipline. He
2 didn't beat around the bush and say, "Well, I'm not sure." And
3 he was still sent to IA. The difference is, when he goes to
4 IA, he says, "Yes, I did it. You do not have to do an
5 investigation; you do not have to go get the receipts for the
6 alcohol, the tapes from the parking lot. Here's the text why I
7 bought the alcohol. It was not for me. I was not drinking in
8 my car." That doesn't matter. It's a matter of if the alcohol
9 is in your car or not. And he had that violation sustained.

10 There is a huge difference, and you heard about that
11 from a couple of different people. The Internal Affairs
12 investigator's job is to self-police police. Sworn officers
13 investigate sworn officers. And if you do not cooperate in
14 that investigation, it affects the integrity of the Department.

15 And it is undisputed that Lieutenant Welch went to
16 three interviews. Now, she said, "I told them I did that all
17 the time, so I can't remember this particular incident, just
18 give me a written reprimand and I'll be fine with it."

19 I think it was Chief Schultz said, "I can't, when I
20 was a patrol person, stop a car for speeding and have them say,
21 'I wasn't speeding this time, I don't think, but I sped last
22 month,' and give them a ticket for that." That's not how due
23 process works in the United States. It's case by case,
24 specific by specific by specific. And Cecil Knox, who
25 unfortunately we weren't able to put on the stand because he's

1 passed away in the course of this litigation, did the
2 investigation and he called Lieutenant Knox [sic] back three
3 times, he gave her three chances to tell him "I have thought
4 about it and now that you've shown me the receipt and now that
5 you've shown me a picture of me carrying beer out of the store,
6 I remember now that on October 20th," or the date it was, "I
7 purchased alcohol and I violated the SOP." She never did that.
8 She brought her own representative, which she has every right
9 to do, and she brought a lawyer that she hired, which she has
10 every right to do, to three different interviews. That does
11 not indicate that she was willing to admit that she had done
12 something wrong and take a written reprimand, which is what
13 Laskar and Marquez both did. They fell on their swords.

14 Her situation was different. Her discipline was
15 different. You heard people say, and I think you probably
16 experience this in your everyday life, if you steal a cookie
17 from the cookie jar and that's -- you can get in trouble, but
18 if you lie about it, in my house that was way worse than
19 actually taking the cookie. And that's the situation that
20 Lieutenant Welch found herself in and that's the situation the
21 investigator found himself in and that's the situation that the
22 people in her chain of command had to deal with.

23 Cecil Knox recommended termination. He was sure she
24 had lied to him. Went up the next click in the chain of the
25 command. Feist said, and it's actually the same standard that

1 the judge instructed you on today, preponderance of evidence is
2 what they use in Internal Affairs. Is it more likely than not
3 that the offense occurred, that the SOP violation occurred?
4 Feist said, "I could tell, weighing it like this, that several
5 of the violations occurred. The evidence was there."
6 Circumstantial evidence, direct evidence. But for lying, he
7 said it was 50/50. And if it's 50/50, the tie goes to the
8 runner. We all know that from our playground days. And in
9 this case the City is the runner. If in your deliberations you
10 find that the evidence is 50/50 on whether there was
11 discrimination or harassment or just horsing around and bad
12 jokes, then you cannot find for Lieutenant Welch. You need to
13 find for the City. Preponderance of the evidence, 50/50, just
14 like Feist gave her the benefit of the doubt, you would give
15 the City the benefit of the doubt under the same standard.

16 He recommended an 80-hour suspension. It went to
17 Chief Schultz. Chief Schultz imposed a 40-hour suspension, but
18 he gave her a chance, kind of -- I think she said it's kind of
19 like probation or parole, that you serve some amount of time
20 but they reserve some other time, and if you don't have an
21 offense within six months, then that goes away, but if you do
22 have an offense in that period of time, you get the whole
23 passel of hours dropped on you.

24 And that's what happened here. It was a 40-hour
25 suspension. There's no question. You can look at the

1 documentation. But some was held in abeyance to help her out,
2 see if she'd learned her lesson, and that was never imposed
3 because she rode out the abeyance. He reported her name to the
4 New Mexico Law Enforcement Academy, not because she was a
5 woman, but because she had a 40-hour suspension, and he
6 reported everyone with a 40-hour suspension or in the -- or
7 above to the New Mexico Law Enforcement Academy regardless of
8 gender. That's what you have to decide. I would submit that
9 he made it clear that it was a disciplinary level, not a gender
10 issue for reporting officers to NMLEA. So that was not
11 discriminatory.

12 The punctuality memo. Let's look at the fact. The
13 punctuality memo is not discipline, it's not an adverse
14 employment action. It was notification that Hubbard expected,
15 saw a pattern developing -- you heard him say that -- saw a
16 pattern developing and wanted to nip it in the bud. "Hey,
17 Detective Welch, can you let me know where you are and can you
18 be where you're supposed to be on time?" Within a month, he
19 gave that same memo to Gagne. The same day he expressed those
20 same expectations to everyone on the team, because he didn't
21 want things getting lax. He was seeing a pattern, and he
22 didn't like it. And he has every right as a supervisor to say,
23 "Ah, I think we need to remind each other that we need to be
24 where we're supposed to be on time." That's a reasonable
25 expectation in the workplace. Or call.

1 Terysa Welch says that she and Mike Hill are exactly
2 the same, and that's a factor in discrimination. The male has
3 to be similarly situated, he has to be in the same exact
4 position. That is not the case here. They both missed the
5 range training that day, but as people who have worked places
6 and people who have had employees, there is a huge difference
7 between the employee who calls and says "I've got a flat tire,"
8 I'm on a foot chase, I can't be there at the time I said I was
9 going to be there," and the one who's a no-call, no-show.
10 There's a huge difference. Those two people do not get treated
11 the same in an employment environment. A no-call, no-show in
12 the fast-food business can be fired. Someone who's called, you
13 might give them a break depending on their history, but they
14 are not similarly situated male and female so that the only
15 difference, as Mr. Villa seemed to imply, between how they were
16 treated was based on their gender. You heard the testimony.
17 He called. He called twice. She didn't call at all. That's
18 why they received different treatment by their supervisor.

19 Everyone was reminded that you need to be on time,
20 you need to be where you're supposed to be, and she just got a
21 personalized memo along with Gagne on August 17th. Not
22 discipline, not an adverse employment action, not something
23 that you could grieve under the union contract.

24 The next thing I want to talk about is the transfer.
25 I would submit that the evidence is clear that Lieutenant Welch

1 asked for a transfer. You can look at Exhibit 4 where Beth
2 Paiz wrote down what Lieutenant Welch reported to her when she
3 called and she asked to get out. And she asked to get out.
4 She first asked to get out to the Academy. Previous to that,
5 actually, she'd asked West in the IA investigation if she could
6 be transferred to Intel during the course of the investigation,
7 so she'd asked -- she made it clear that she was willing to
8 move around, and he didn't have the ability to do that. But
9 Chief Paiz did, and Chief Paiz asked her where she wanted to
10 go. She said the Academy. She set that over the weekend, and
11 then the next week Lieutenant Welch called and said, "You're
12 going to kill me. I went to Burglary, I liked it, I'm happy to
13 go there," and she went there.

14 Now, I think that's a voluntary -- voluntary means
15 that you volunteered to do that, transfer -- as opposed to an
16 involuntary transfer, where you are forced to go someplace in
17 the workplace that you don't want to go to. The law is really
18 clear, and you have an instruction on it. It's in Jury
19 Instruction 11. And Jury Instruction 11 imparts as an
20 involuntary transfer, you give her the benefit of the doubt
21 that the transfer wasn't involuntary, without more does not
22 constitute an adverse employment action if it does not involve
23 any significant change in the employee's conditions of
24 employment. It has been very clear that she made the same
25 money, had the same benefits, had the same job duties with a

1 different focus. When she was transferred, they didn't collect
2 her ROP equipment. She continued to have the same ROP
3 equipment that she had. And so this instruction goes on and it
4 says, "For example, an involuntary transfer does not constitute
5 an adverse employment action if salary and benefits remain the
6 same and duties are substantially the same." Lieutenant Welch
7 will argue that her duties were changed drastically, but you
8 heard what the detective's description is. It is to develop
9 cases. It's to develop confidential informants. It's to write
10 arrest warrants. It's to capture bad guys. That was her job
11 at ROP. That was her job at Burglary. And they had the same
12 pay and benefits attached to them.

13 You heard about the investigation that was done, and
14 Doug West did that investigation, and Doug West did that
15 investigation as an IA officer because Lieutenant Welch, after
16 she filed her Complaint with the EEOC, which she had every
17 right to do, she walked her Complaint over to Internal Affairs
18 and handed it to Doug West, and he was a veteran detective who
19 thoroughly and impartially investigated the two issues related
20 to the Complaint that Lieutenant Welch brought him and found he
21 couldn't substantiate discrimination, retaliation, or sexual
22 harassment after he interviewed the people that he interviewed.

23 He did substantiate two issues that he found that
24 were brought out in the Complaint. He substantiated that there
25 was a parking lot bump between Danny Garcia and Sergeant Smith.

1 And this is one time where you -- of numerous times where you
2 heard that Lieutenant Welch weaponized information against her
3 teammate. She took this piece of information that she got from
4 Danny Garcia regarding a bump in the parking lot where he said
5 he was venting to her about it. He didn't report that. And
6 years later she had that in her packet and she reported it in
7 her EEOC Complaint.

8 She also took Sergeant Smith's act of comforting her
9 in a devastating personal situation and sexualized those acts,
10 a hug, a hand call, an offer to take her home to get her pets
11 and her clothes and then calls to make sure that she was okay.
12 You have to decide if that's comforting behavior or sexualized
13 behavior. You've seen everyone involved in that.

14 She never had a crucial confrontation, so he doesn't
15 know that bothered her. Who knows if she knew it bothered her
16 at the time. She took a jokingly complimentary remark made by
17 a man she knew was happily married, on a physical assessment,
18 and silently kept that for five years. She admitted she did
19 not tell him or anyone else that she found the joke to be
20 harassing or offensive. Five years later, after she was
21 criticized, she pulled the note out and used it to make a case
22 that she was in a hostile work environment because of her
23 gender. She never had a critical confrontation about that
24 issue either.

25 Lieutenant Welch admitted that she told Detective

1 Hill that she knew he was having an affair with her brother's
2 wife, her baby brother who it was very clear she loves, but she
3 told him she wouldn't tell her brother, kept that in her
4 pocket. She then files a complaint that Hill should have been
5 punished for missing the same practice at the range that she
6 missed and that he should have received a punctuality memo as
7 well. She didn't let anyone know that she thought that was
8 discriminatory.

9 Lieutenant Welch complimented J.P. Potter for
10 slimming down, and when he continued the banter, he alleges
11 that she -- he propositioned her to have a threesome with him
12 and his wife. He didn't tell -- She didn't tell her [sic] that
13 that wasn't just a joke and that it offended her and that she
14 thought that was harassing.

15 She heard three for four penis jokes between two
16 coworkers over nine years working with them. She testified she
17 walked out. She never testified that she told them to stop
18 until she got the punctuality memo.

19 Even if you believe -- I have a time limit, so I have
20 to check.

21 Even if you believe every word that Lieutenant Welch
22 says, the City can't do anything about a situation that it
23 doesn't know about. Lieutenant Welch admitted that after she
24 filed her first Complaint the City required the entire division
25 to attend an EEOC discrimination refresher course. But then

1 she claims that that refresher course was punitive. So if the
2 City hadn't have had the course, it would have been a problem;
3 if the City did have the course, it was a problem for her.

4 She claims that the City put three separate trainings
5 that involved over 70 people for four hours apiece, they put
6 that on to punish her. She doesn't see this as an appropriate
7 remedial action but as punishment for her. Is this the most
8 logical explanation of how the City reacted when they saw a
9 need for training, or is it more logical that once the City was
10 aware, tried to stop the problem she perceived by educating
11 people she worked with on the law?

12 The City can defend against claims of sexual
13 harassment by proving to you, which I think we did, that it
14 exercised reasonable care to prevent and promptly correct
15 sexually harassing behavior.

16 The City proved that when it learned of the alleged
17 harassment it took eight remedial actions. You heard about
18 each of them. The City had the Internal Affairs Department
19 fully and independently investigate Lieutenant Welch's claims
20 and take action on SOP violations that were sustained.

21 Second, the City removed David Hubbard and Rob Smith
22 from the work environment until the Internal Affairs
23 investigation was done. The City has no control about when the
24 EEOC investigation might be done. They can take years to
25 finish those. So you can't just wait that -- You have to do

1 your own investigation, take action on what you know as a
2 governmental entity, and the City did that.

3 Third, the City implemented the EEOC refresher course
4 which we just talked about.

5 Fourth, Deputy Chief Paiz takes the initiative to
6 call Lieutenant Welch when she hears from a mutual friend that
7 she's unhappy and wants out of ROP to see if she can help her
8 achieve that goal. She calls Lieutenant Welch on her first
9 week of being deputy chief because she's trying to help her
10 out, and when she reaches out to her, she asks Lieutenant Welch
11 what she wants to do and she tries to make that happen.

12 The best proof of this is the e-mail from Lieutenant
13 Welch's father, it's Exhibit 4f in the book that you're going
14 to get, and he says to Deputy Chief Paiz after his daughter is
15 moved, "You've saved my daughter's life. I am very grateful."
16 So they're trying to take appropriate remedial actions to make
17 Lieutenant Welch happier in her workplace and to create a
18 better environment for her to work.

19 Fifth, the City ensured enforcement of existing rules
20 with zero tolerance of shenanigans and banter. You heard about
21 that. David Hubbard put those rules in effect, and then they
22 were complained about. He was under orders to put those rules
23 in effect. He did not put those rules in effect to punish
24 Lieutenant Welch. He put those rules in effect to keep himself
25 from getting into trouble because he had let his team get lax

1 with the rules. He was giving them a lot of freedom because he
2 had a lot of respect for them, and he knew they worked hard and
3 he was letting them come and go, and it ended up getting him in
4 trouble, and he was disciplined for that.

5 Sixth, the City changed Lieutenant Welch's reporting
6 structure as soon as the City became aware of her EEOC
7 Complaint. Commander Hudson became her direct supervisor. She
8 skipped over the sergeant and lieutenant positions, and she
9 could take it directly to him, any problems that she had in her
10 day-to-day or any problems that she had based on her
11 perceptions of how things were working in the unit at that
12 time.

13 Seventh, the City ordered Rob Smith not to interact
14 with her at all. When he returned to the unit, he didn't talk
15 with her, he didn't supervise her, he didn't visit with her, he
16 didn't joke with her. He was ordered to have no contact with
17 her because she perceived -- and finally in 2009 had let the
18 City know that she considered him to be a problem in her
19 worklife.

20 And eighth, the City checked out their offices and
21 facilities for inappropriate photos, pictures. Anything that
22 could be perceived as sexual in nature, harassing or
23 discriminating was scrubbed from that environment. So the City
24 has also proven that it took appropriate remedial actions when
25 it became aware of the problem. The City's also proven that

1 Lieutenant Welch failed to take advantage of protective,
2 preventive, corrective opportunities that the City provided.
3 She didn't go to APD HR. She didn't go to the City HR. She
4 didn't go to the City's Equal Employment Office. She didn't go
5 to the command staff outside of her immediate command. She
6 didn't go anywhere. She made a formal Complaint to the EEOC,
7 which she had every right to do, without utilizing the City
8 procedures to help them become aware of her problem and fix
9 that problem at the lowest possible level.

10 So we think we've proved our affirmative defense.

11 Let's talk about Rob Smith a little. You saw him.
12 You've seen Terysa Welch. You've seen everybody. Some people
13 are friends with some people and some people are friends with
14 other people, but they all had to work together for these years
15 that we're talking about.

16 Terysa Welch claims she had no issues with Rob Smith
17 when he was the sergeant at Northeast Impact; that he was a
18 jokey gentleman; that she -- she and he got along fine. But
19 before she even goes to ROP, the date on the physical
20 assessment is before she goes to ROP, she immediately claims
21 she experienced sexual harassment from him. Have you ever
22 heard the proverb a leopard can't change its spots? It's from
23 a Bible verse, Jeremiah 13:23, and it means that a leopard is
24 always showing you its true nature; it can't change from being
25 a spotted cat into something else. And if you believe Terysa

1 Welch, she's saying that he changed from a -- he changed into a
2 sexual predator, harassing person after years and years of
3 behavior that was inconsistent with that nature. That doesn't
4 make sense.

5 I want to talk a little bit about damages. You were
6 instructed not to consider the issue of damages until or unless
7 you determine that the City sexually harassed or sexually
8 discriminated against Lieutenant Welch. We don't think that
9 you will be considering damages based on the facts, but if you
10 do, she claims four different kind of damages. We've talked
11 about loss of reputation, and so I'm not going to go over that
12 again.

13 The other three kinds of damages are lost overtime,
14 and she had an expert witness testify -- Remember the guy on
15 the screen? He was our first deposition witness. And
16 Dr. McDonald testified -- this is an easy one -- that
17 Lieutenant Welch worked less overtime after she was transferred
18 from ROP. That's a fact. That is not a measure of her
19 damages, however. Dr. McDonald assumed Lieutenant Welch had
20 less overtime opportunities after she left ROP. He also
21 testified that if that assumption is wrong that she had less
22 overtime opportunity, then his calculation of \$27,638 is wrong.
23 You-all heard Chief Paiz, Chief Schultz, Commander Hudson,
24 Deputy Chief Prudencio, Hubbard, Roseman, virtually everyone in
25 the rank of sergeant above says that there were plenty of

1 overtime opportunities at APD during these years that we're
2 talking about. You also heard that Brian McDonald said if she
3 could have transferred back to ROP at any time before she was
4 promoted, that that cut off her claim to overtime. And you-all
5 know that 45 days after she was transferred to Burglary she had
6 an opportunity to return to ROP, on February 1st, 2010. She
7 chose not to exercise that option. That cuts off her claims to
8 overtime. Both of the assumptions that he thought of have been
9 proven wrong in this case, and so she's not entitled to any
10 overtime damages.

11 You've heard her say that she experienced emotional
12 distress. Both she and her husband testified about that.
13 They're happily married. They haven't sought counseling.
14 She's had some stomach issues. She tried some medications.
15 She has continued to do, as she described, very well in her
16 job. She's not acting -- She had counselors for a little
17 while; didn't think that they helped her. So you've got to see
18 if she has truly suffered emotional distress because she was
19 transferred.

20 Loss of enjoyment of life is in that same category.
21 During this time period, she courted her husband, she married
22 her husband, she's mothering a stepson, she testifies that she
23 does her job well, and she has pride in her work. What has the
24 City deprived her of based on the things that she's complaining
25 about? She's not identified any activities that she's unable

1 to do because of sexual harassment or sexual discrimination,
2 that she claims ended in 2012 anyway, so we don't believe that
3 any of these categories of damages can be awarded to her even
4 if you find that there's harassment or discrimination.

5 The question you have to answer is whether her
6 coworkers and supervisors had issues with Lieutenant Welch
7 because of her gender or because of her actions and behaviors.

8 We will tell you that she was never subjected to any
9 negative evaluations, she was never demoted, she never had a
10 pay decrease. Her duties as a detective were never stripped
11 from her, she was never pushed out of the police force. She
12 has not been the victim of sexual harassment or discrimination,
13 but suffered and is suffering the interpersonal consequences of
14 her pen and her silence.

15 We count on you to be the guardian of the facts you
16 have heard and render a verdict in the City's favor.

17 Thank you.

18 THE COURT: All right. Thank you, Ms. Williams.

19 Ladies and gentlemen, when we convened this morning
20 with the attorneys, I allocated equal time to each party.
21 Because the plaintiff has the burden of proof on the claims,
22 plaintiff has the final say, and Mr. Villa reserved part of his
23 time for his rebuttal. We're pushing into the noon hour. I'll
24 just ask for your indulgence as we continue on and wrap up.

25 Mr. Villa.

1 MR. VILLA: Thank you, Your Honor.

2 Ladies and gentlemen, let's just get one thing
3 straight. Terysa Welch is a lieutenant today not because of
4 anything the City did, but because of her resilience. It's
5 that same resilience that caused her to help struggle through
6 this for all those years, and, as Ms. Williams tried to
7 suggest, didn't point things out until 2009.

8 Remember the testimony, that for a sergeant you do a
9 test and you go through a process, and once you've established
10 that, you've passed the test and you go through the process,
11 you get on a list, and then they just go down the list and fill
12 the spots as they become open. The same process is true for
13 lieutenant. You take a test, you go through a process, and
14 then you get on a list, and you stay on that list until they
15 fill you.

16 And Terysa Welch became a sergeant and became a
17 lieutenant not because of the City, but but for the City's
18 actions. She did it because of her resilience. Beyond
19 lieutenant, she cannot promote any higher unless she's
20 selected. It becomes political at that point. The Chief or,
21 as you heard with Beth Paiz's situation, perhaps the mayor can
22 make a recommendation, and that's where her career has stopped
23 since all this happened. You heard her testify that if she had
24 her druthers she'd like to go back to SID, but SID is an
25 invitation-only kind of place. She's not been invited since

1 any of this happened.

2 So she's in the position that she's in because of her
3 resilience, ladies and gentlemen.

4 Now let's talk about the claim that somehow her
5 taking notes on teammates is what caused this. Well, you heard
6 all the evidence. What was the evidence that she was taking
7 notes on her teammates? You've got one exhibit, Exhibit A, the
8 defendant's exhibit which is four pages of Terysa Welch's
9 notebook from July 9th until August 2nd. You get to look at it
10 when you go into the back, but here it is. There's a note on
11 the first page about Kevin Gagne. There's not a single note
12 about anybody else. There's a note on the second page talking
13 again about Kevin Gagne and a little bit mention here of a time
14 when he was Acting Sergeant, and not a single note on anybody
15 else.

16 The third page, again, lots of notes about things
17 that she did, activities that day that she testified she wrote
18 down all the time to try to remember when she was doing her
19 time sheets. So this third page is essentially all notes about
20 different things that happened, with the exception of here, I
21 think -- Well, no, sorry. So this entire page is things she's
22 doing as a ROP detective.

23 And then the last page does have notes concerning
24 meeting with Sergeant Hubbard, Mike Hill not getting the memo;
25 then the next day she goes to the range, July 29th, her meeting

1 with Lieutenant Smith, which she wrote down, as you heard, so
2 she could remember these things. The next day her meeting with
3 Captain Commander Hudson, and the rest of this is personal
4 items, items that happened throughout the course of the day so
5 she could remember what she was doing for time sheets and
6 things like that. And that's it.

7 So Ms. Williams says this has to do with her taking
8 notes on her teammates. Well, that's all you've got. This
9 isn't about notes that she took on her teammates. This is
10 about what she endured and what she experienced from 2004 and
11 through 2012. And it wasn't caused because she wrote notes on
12 her teammates. And you need to think about if that's what the
13 City's position is, if that's why they say all this happened
14 and all these issues occurred is because of Terysa and because
15 she's taking notes on her teammates, why is this all the
16 evidence we have?

17 You get to use something in this trial. You didn't
18 see it in the instructions. You walked in here with it, and
19 it's your common sense. And when you're evaluating this
20 evidence and what it means and what you think happened, you get
21 to use your common sense. So I think you can use your common
22 sense about this defense that somehow this has to do with
23 Terysa taking notes.

24 Rob Smith. Ms. Williams says Rob Smith didn't know
25 because Terysa never got to use crucial confrontation, she

1 didn't point out to him that these things were sexual
2 harassment. Well, ladies and gentlemen, there's some things
3 that, you know, maybe it's not crystal clear, especially in an
4 environment where it's high stress and people joke and things
5 get talked about, and there are some things where it's great
6 and you don't know, and so I think you can say, "Hey, that's
7 off limits" or this is okay, but the things that Rob Smith was
8 doing, you don't have to be told, you don't have to be told
9 that it's not okay to tell your subordinate employee that you
10 want to have children with them. You don't have to be told
11 that it's not okay to tell your subordinate employee who works
12 for you who you have power over that you would be pursuing them
13 if you weren't married. You don't have to be told that you
14 can't go up to your subordinate employee when no one else is
15 around and go "Umm, umm, looking good today; oooh, that body's
16 tight as a drum." You don't have to be told those sorts of
17 things. You don't have to be confronted about those sorts of
18 things.

19 And here's something else I want you to think about
20 when it comes to crucial confrontation, because who in this
21 trial never asked a single question of Rob Smith? The City.
22 Remember I called him, I put him on the stand, asked him
23 questions, and neither Ms. Williams or Ms. Wiggins asked him a
24 single question. They didn't even confront him. They didn't
25 even ask him anything. They didn't call him back in their

1 case-in-chief. Why didn't they confront him? Why didn't they
2 ask him what he did? Why didn't they get his side of the
3 story? What were they worried about? They want Ms. Welch to
4 do it, but they don't even do it themselves. Think about that
5 for a minute.

6 Now, again let's think about Ms. Terysa Welch's
7 circumstances. Ms. Williams said when she got up here she's
8 not going to get to correct embellishments or exaggerations by
9 me. Analyze what she just told you. She tried to tell you
10 that the personal fitness assessment evaluation happened before
11 she was in ROP. And that part's true. The May 24, 2004,
12 assessment that she took, she took that before she got into
13 ROP, but she told you when she got the note from Rob Smith on
14 it, she got it in her ROP cubicle after she had already gotten
15 into ROP, without any explanation as to why that was there or
16 how it got there. So that did happen while she was in ROP.

17 And think about Terysa's situation. She's supposed
18 to confront the head of the unit, the tip of the spear, the
19 alpha who wanted her there in ROP, there's no question. I
20 don't doubt Rob Smith's motives at all for wanting her in
21 there. He wanted her in there I think for two reasons. One,
22 because he thought he saw it as a law enforcement tool; and,
23 two, he was in a position of power that he hadn't been in
24 before and he could take advantage of it with Terysa and treat
25 her the way he treated her. Terysa knew that at the time. She

1 didn't know he was going to change from the way he was in
2 Northeast Impact. He didn't bring her into Northeast Impact.
3 He brought her into ROP. So now he had the control. He had
4 the power.

5 That old metaphor about a leopard changing their
6 spots, that doesn't address at all the power dynamic that
7 changed from Northeast Impact to ROP. Because now Rob Smith
8 was in control. Rob Smith, the guy who became the next
9 lieutenant; Rob Smith, the guy whose buddy from the Academy or
10 his buddy to this day Commander Hudson was running the whole
11 unit. Who had the power in SID and ROP? Rob Smith. And
12 Terysa knew it and she knew it well, and she knew if she spoke
13 out on it what would happen. And what did happen when she
14 spoke out? How did that work out for Terysa? Not so well.

15 Now, she gets this note, and Ms. Williams says she
16 kept it for all these years. Well, do you think she would have
17 kept the note for all these years if that was the only thing
18 that happened, if Rob Smith had just given her this one note
19 and then everything was cool? Do you think she would have hung
20 on to that? No. You get to use your common sense, ladies and
21 gentlemen. She held on to it, and the behavior continued and
22 the behavior escalated and it didn't stop and it didn't stop
23 when he left and became a lieutenant. He kept doing it.
24 That's why she kept it, because she knew some day this day
25 would come and she needed to be ready, and she knew she was

1 going to get attacked if all she had were her words versus
2 other words. She needed proof. She knew, she was a detective.
3 She wouldn't have held on to that if that didn't happen.

4 Ms. Williams tried to tell you there were seven
5 things that happened over the course of nine years. That was
6 not the testimony. You heard the testimony from Terysa Welch.
7 It was constant. When he was a sergeant, he was there every
8 day. It was any time that she was alone. She avoided him
9 because of it. He made comments about her all the time, and it
10 didn't stop when she was a lieutenant -- when he was a
11 lieutenant either. The access was different, but it didn't
12 stop. And it didn't stop even when she had an extremely
13 traumatic experience in her life with her fiancé David Maes
14 getting arrested. You know, Rob Smith couldn't dial it back
15 for one day and say, you know, This is pretty bad, maybe I
16 should just help Terysa out. No. Because he keeps up the same
17 thing. He grabs her, squeezes her, hadn't even told her what's
18 going on, tells her in that moment "I will be pursuing you if I
19 weren't married." I mean, he can't dial it back for one day.
20 This is the person she's supposed to confront and say stop
21 this. And then when she finally does, look what happens.

22 And notice Ms. Williams talked to you about the
23 defense, the sexual harassment defense, and she didn't
24 differentiate between coworkers and supervisors. She got up
25 here and said that the City did the things they were supposed

1 to do, they addressed it, they took these eight different
2 steps. Well, ladies and gentlemen, she didn't tell you that
3 only applies to coworkers.

4 You saw the instructions, and here they are. Jury
5 Instruction No. 10, sexual harassment by coworkers. If you
6 were to believe that the City did anything to promptly correct
7 the sexually harassing behavior, it only applies to coworkers.
8 It doesn't apply to supervisors. The actions of the supervisor
9 are the actions of the City. This defense has nothing to do
10 with Rob Smith's behavior or what he did.

11 Now, you can look at this defense when it comes to
12 coworker harassment and decide if the fact that they never,
13 ever tried to sit down with Kevin Gagne, J.R. Potter, Sergeant
14 Hubbard, Terysa Welch, or anyone else and say, "Let's figure
15 this out. Let's mediate. Let's talk," you can decide if the
16 fact that they never did that, that they briefly moved the guys
17 out and then moved them right back in, that then right after
18 that Smith tries to bull Terysa over in the hall, somebody
19 leaves a blank transfer form in her box, you can decide whether
20 you think the EEOC training really fixed these problems, but
21 you can only decide it with respect to coworkers. Not
22 supervisors. When Rob Smith was a supervisor and he acted, his
23 actions were the actions of the City.

24 I want to talk just a little bit about the
25 disciplinary process because Ms. Williams said that Laskar and

1 Marquez were different. Well, both Laskar and Marquez were
2 told immediately after they bought alcohol what they had done,
3 and so of course they could remember it. Terysa wasn't. And
4 who got to pull that string? It wasn't Terysa. It was Doug
5 West. Doug West who had just two months earlier gotten
6 interviewed by an EEOC investigator questioning him about the
7 propriety of the interview he did that Ms. Williams relied upon
8 as the City remediating this problem. He gets questioned about
9 it. Now he's the Commander of SID. So ask yourselves whether
10 his Internal Affairs investigation was truly fair and impartial
11 when he goes from IA to now he's running SID. And he gets to
12 make the call, and he gets to make the decision about whether
13 Terysa should be called and say, "Hey, did you just buy alcohol
14 in your vehicle? Here's your written reprimand. We'll sign
15 you up." Or should we go through the IA process and not ask
16 her about it until 18 days later? But when that did happen,
17 Terysa did the same thing that Laskar and Marquez did. "Yeah,
18 I probably did that. I'll sign my written reprimand." And
19 Knox said, "No, that's not the way it works. We're going to go
20 through these IA interviews." And in the course of those IA
21 interviews, she admitted, "Yes, I was there," she admitted,
22 "Yes, that's me," she admitted she buys alcohol and transports
23 it in the vehicle, just like Danny Garcia told you happened all
24 the time. And she admitted she had just gotten off work. The
25 only thing that she wouldn't admit because she couldn't

1 remember is did it happen on this particular date. And that is
2 the difference. That makes her a liar. That requires her to
3 serve a suspension instead of a written reprimand. That
4 requires her name to get sent to the New Mexico Law Enforcement
5 Academy where they can take action on her license. That just
6 doesn't make sense, ladies and gentlemen, and it tells -- shows
7 you the way the City has approached this thing. This is their
8 mentality. This is what Terysa is supposed to rely upon to go
9 complain about Rob Smith? These are the folks she's supposed
10 to put her faith in? It just doesn't make sense. You can take
11 a step back. You don't have to look at the policies anymore or
12 the chart of sanctions or anything like that. Use what you
13 walked in here with, your common sense, and say "What is this
14 whole Walgreen's thing really about? Why go through all this?
15 Does any of it make sense except for the fact that she's a
16 woman, she complained, and supposedly she's supposed to
17 complain earlier and that's going to help her, and now this is
18 what we're going to do to you for it?

19 The idea that it wasn't discrimination, that the
20 entire five years Terysa Welch is in ROP and has never made
21 Acting Sergeant is also something you can just take a step back
22 and look at. It doesn't make any sense. The argument is it's
23 a seniority thing. Well, Potter got into the unit in 2008. He
24 didn't have unit seniority. Mike Hill got into the unit at the
25 same time as Terysa. He didn't have unit seniority either.

1 Just because he was a lieutenant in Carlsbad before, that's the
2 reason why Terysa never gets to be an Acting Sergeant?

3 And all you have to determine when you're looking at
4 these things is, was gender a motivating factor? It doesn't
5 have to be the only factor. Just was it a motivating factor.

6 And there's a real appreciable loss that you heard
7 about. If you're a sergeant for more than a certain period
8 amount of time, you get a higher pay. It also helps you to
9 learn the roles and duties of a sergeant for future use. And
10 Terysa Welch was never given those opportunities.

11 You heard that somehow she was upset with Detective
12 Mike Hill, and that never came out whatsoever. Ms. Williams
13 said that she complained that Mike Hill should be getting a
14 memo too. That's not what she complained about. She
15 complained that she was getting a memo and Mike Hill didn't.
16 She wasn't saying Mike Hill should get a memo. And all this
17 business about somehow she's angry with Mike Hill because of
18 the relationship he had with her sister-in-law, did you hear
19 any of that from Mike Hill or Terysa Welch? They still
20 communicated afterwards. They're still friends. That didn't
21 have anything to do with this. Why would that even be an issue
22 in this trial if you're not trying to be redirected and look at
23 something else that isn't there?

24 Ms. Williams talked to you about the sergeant exam.
25 And, yes, Terysa said "I shouldn't have had to write that

1 letter to Chief Schultz, the same guy who knew about my
2 complaint to the EEOC, the same guy that knew it was Kevin
3 Gagne who reported me and I had called on him in the EEOC, and
4 the same guy that imposed this discipline on me, that if he
5 hadn't imposed it on me, I wouldn't have to write this letter.
6 Yes, she complained about that, but she didn't complain that
7 her not passing the test had anything to do with anybody.

8 Ms. Williams just tried to suggest to you that there
9 was some claim by Terysa Welch that her failure of the test or
10 her not getting the sergeant right away was somehow the City's
11 fault. She doesn't blame that on anybody. She said she
12 shouldn't have to write that letter, but that was never an
13 issue brought up by Ms. Welch.

14 Now, she said there isn't any damage to her
15 reputation because of the -- because she's been promoted and
16 that shows that her reputation isn't damaged. Well, again, the
17 sergeant and lieutenant process to get promoted is what she
18 earned, and anybody that becomes a sergeant and lieutenant gets
19 there because they've earned it. But beyond that, going over
20 to SID, becoming a commander, those things, that's your
21 reputation, and those are the damages that she still feels
22 today. She hasn't been invited back to SID and has not been
23 promoted in any way, shape, or form.

24 Now, on one hand Ms. Williams says to you that the
25 transfer from ROP to Burglary was voluntary, but on the other

1 she said Paiz moved her because she wasn't safe in the
2 workplace anymore and she did the right thing and got thanked
3 for it by her father. She said that was the best evidence, the
4 e-mail from her father that says "You saved her, and I
5 appreciate it, thank you."

6 So how is that the best evidence of what that
7 transfer was and yet the transfer's voluntary? Terysa didn't
8 have any choice. Her safety was at issue. That fancy EEOC
9 training that Terysa didn't say was punitive, Sue Neal and the
10 others in SID said it was punitive, it didn't stop Rob Smith
11 from trying to bull her over in the hallway, that order to Rob
12 Smith to stay away from Terysa didn't stop him from trying to
13 bull her over in the hallway.

14 She was not safe. She had no choice but to leave.
15 Of course she agreed to the transfer. She didn't have a
16 choice, and she hoped that the transfer was going to be
17 temporary.

18 Now, Ms. Williams said, "Well, she could have come
19 back in 45 days." But you saw Beth Paiz's own notes. Eight
20 days before she's due to come back, everybody in ROP, even the
21 new guys who didn't even know her were saying "We don't want
22 Terysa back." She's supposed to go back to that atmosphere,
23 back to Sergeant Hubbard?

24 I thought, gosh, I thought if you confronted
25 Lieutenant Smith about his behavior that that would fix it,

1 that that would stop it, that somebody would do something about
2 it. Well, it clearly didn't on December 11th when he tried to
3 bull her over in the hallway, and two months later she's
4 supposed to go back to that atmosphere, she's supposed to go
5 back to that supervision.

6 Clearly, she can't go back in those circumstances,
7 and she can't go back. Nothing has been done. They've never
8 tried to address these folks. They did a four-hour sham EEOC
9 training in which Sue Neal couldn't even tell you, ladies and
10 gentlemen, if that crucial confrontation was only supposed to
11 be for coworkers or supervisors. You still never got that
12 answer. That's the person that Ms. Williams says, "Well, why
13 didn't she go to City HR?" Sue Neal was City HR, APD HR. This
14 is who she's supposed to put her faith in?

15 And don't forget, ladies and gentlemen, that through
16 all of 2010 and all of 2011 and 2012 the City had taken no
17 steps whatsoever to address these circumstances, to try and
18 remedy these circumstances, to make it a safer atmosphere in
19 any way, shape, or form for Terysa Welch to go back to ROP. So
20 not only was her transfer involuntary, her ability to go back
21 to ROP was not voluntary.

22 And you heard the evidence about the difference.
23 Ms. Williams pointed out to you the jury instruction, that
24 involuntary transfer alone is not enough if there aren't
25 changes in benefits. Well, we know she lost overtime. It's

1 undisputed that the amount of overtime was less. She did work
2 overtime. Brian McDonald testified that she worked overtime in
3 Burglary. It was just less than is available in ROP.

4 And you don't have to discard your common sense when
5 you're thinking about what's the difference to a detective in a
6 detective's career between ROP and Burglary. It might be one
7 thing if you're in Burglary and you're working your way up. It
8 might be another thing if you just want to stay in Burglary.
9 It's something completely different when you know what ROP's
10 really about, when ROP's where you want to be, ROP's the
11 prestigious unit, ROP is the unit where you want to be. Not
12 only was there a loss of benefit in overtime, there was a loss
13 of prestige. This is a much different situation than being in
14 Burglary.

15 So, ladies and gentlemen, my time is up. I'm sure
16 you-all want to go back and get this thing rolling. What I'm
17 asking you to do is just look at this with common sense. You
18 heard all the evidence. You've seen all the evidence. We've
19 argued it until we're blue in the face. Terysa Welch
20 experienced sexual harassment by her supervisor, she
21 experienced sexual harassment by her coworkers. The City did
22 nothing to remediate the coworker sexual harassment, which is
23 all this defense applies to, and Terysa Welch was discriminated
24 against. Those things caused her transfer, those things caused
25 her discipline, those things caused her emotional distress,

1 damage to reputation, and loss of enjoyment of life, and we ask
2 that you compensate her for those losses.

3 Thank you for your time.

4 THE COURT: All right. Thank you, counsel.

5 I mentioned to you that I have a few more
6 instructions for you. Picking up where I left off, ladies and
7 gentlemen, faithful performance by you of your duties is vital
8 to the administration of justice. Any verdict must represent
9 the considered judgment of each juror. In order to return a
10 verdict, it is necessary that each juror agree to it. In other
11 words, your verdict must be unanimous.

12 It is your duty, as jurors, to consult with one
13 another and to deliberate in an effort to reach an agreement if
14 you can do so without giving up your individual judgment. Each
15 of you must decide the case for yourself, but only after an
16 impartial consideration of all the evidence in the case with
17 your fellow jurors. In the course of your deliberations, do
18 not hesitate to re-examine your own views and change your
19 opinion if convinced it is erroneous. But do not surrender
20 your honest conviction as to the weight or effect of the
21 evidence solely because of the opinion of your fellow jurors or
22 for the mere purpose of returning a verdict.

23 Remember at all times, you are not partisans. You
24 are judges, judges of the facts. Your sole interest is to seek
25 the truth from the evidence in the case.

1 Now, during your deliberations, you must not
2 communicate with or provide any information to anyone by any
3 means about this case. You may not use any electronic device
4 or media, such as a telephone or cell phone, smartphone,
5 computer, the Internet, any text or instant messaging service,
6 blog, or any website, such as Facebook, LinkedIn, YouTube, or
7 Twitter, to communicate to anyone any information about this
8 case or to conduct any research about this case until I accept
9 your verdict. In other words, you cannot talk to anyone on the
10 phone, correspond with anyone, or electronically communicate
11 with anyone about this case. You can only discuss the case in
12 the jury room with your fellow jurors during deliberations.

13 You may not use electronic means to investigate or
14 communicate about the case, because it is important that you
15 decide this case based solely on the evidence presented in this
16 courtroom. Information on the Internet or available through
17 social media may be wrong, incomplete, or inaccurate. You are
18 permitted to discuss the case with only your fellow jurors
19 during deliberations because they have seen and heard the same
20 evidence you have.

21 In our judicial system, it is important that you are
22 not influenced by anything or anyone outside of this courtroom.
23 Otherwise, your decision may be based on information known only
24 by you and not your fellow jurors and the parties in this case.
25 This would unfairly and adversely impact the judicial process.

1 Now, upon retiring to the jury room, you should first
2 elect a foreperson who will preside over your deliberations and
3 will be your spokesperson here in court.

4 A form of verdict has been prepared for your
5 convenience. And this is multiple pages. I urge you to look
6 at it carefully, consider how it's structured, and I think
7 you'll see that it's logically organized so that you can
8 complete your verdict form. You will take the verdict form to
9 the jury room, and when you have reached a unanimous agreement
10 as to your verdict, you will have your foreperson fill it in,
11 date it and sign it and then return to the courtroom.

12 If, during your deliberations, you should desire to
13 communicate with me, please put your message or question in
14 writing, signed by the foreperson, and pass the note to the
15 court security officer, who will then bring it to my attention.
16 I will then respond as promptly as possible, either in writing
17 or by having you return to the courtroom. I caution you,
18 however, with regard to any message or question you might send,
19 that you should never state your numerical division.

20 All right, ladies and gentlemen, that completes
21 instructions to you. At this time Ms. Hall will see to it that
22 you are provided lunch as soon as possible. All the exhibits
23 will be assembled for you; they will be taken back to you. As
24 I said, you will each receive a copy of the instructions.
25 Please do not begin your deliberations until you have all this

1 material, including the exhibits and the instructions, and you
2 may get started.

3 All right. There being nothing else, then please
4 rise for the jury.

5 (Jury out to deliberate at 12:25 p.m.)

6 THE COURT: Okay. Counsel, so just make sure that
7 you have provided Ms. Hall or the Court staff with your cell
8 phone number. Please remain within ten minutes of the
9 courthouse while the jury is deliberating. That way if they do
10 have a note or anything, we can call you back and we can get
11 started as soon as possible.

12 All right. Before we recess, is there anything to
13 take up, Mr. Villa?

14 MR. VILLA: No, Your Honor. Thank you.

15 THE COURT: All right.

16 MS. WILLIAMS: Your Honor, I have a question. Are
17 we going to be able to talk to the jury after they deliver
18 their verdict or not?

19 THE COURT: You know, it's normally my practice to
20 talk to the jury after the verdict. I always ask them if they
21 are inclined. It's not mandatory --

22 MS. WILLIAMS: Sure.

23 THE COURT: -- but that it's usually helpful to
24 counsel --

25 MS. WILLIAMS: Yes.

1 THE COURT: -- to have an opportunity to talk to the
2 jurors. So it's usually up to them. Some of them stay. Some
3 of them don't.

4 MS. WILLIAMS: I appreciate that.

5 THE COURT: You bet. Please remain. Ms. Hall will
6 take an inventory of the exhibits, make sure they're all
7 assembled, and then they'll go back to the jury.

8 Okay. Thanks, everyone. Have a good lunch.

9 (Court stood in recess at 12:26 p.m. and resumed at
10 5:04 p.m. as follows:)

11 THE COURT: Good afternoon. You may be seated.

12 I wanted to visit with you just because of where we
13 are in the day. It is just about five minutes after 5:00, and
14 what I propose to do, but I'll hear you on this, is to send a
15 note back to the jury, and the note would say something to the
16 effect as follows: Given the time of day, 5:05 p.m., the Court
17 and parties want to know if you will prefer to continue
18 deliberating today. Please respond yes or no. If your answer
19 is yes, do you want to order dinner? If your answer is no, I
20 will reconvene court shortly and we will recess for the day and
21 you will continue deliberating tomorrow morning.

22 MR. VILLA: That seems fine, Your Honor.

23 THE COURT: Okay.

24 MS. WILLIAMS: No objection, Your Honor.

25 THE COURT: Okay. I will put that on a note for the

1 jury. If you can just stand by, we'll wait for the answer, and
2 then we'll know what we're going to do this evening.

3 All right. We'll be in recess just shortly. I'll
4 prepare the note.

5 (Court stood in recess at 5:06 p.m. and resumed at
6 5:18 p.m. as follows:)

7 THE COURT: Okay. Please be seated. So just for a
8 moment. So, let me just read back to you the note that I sent
9 back and what was sent back to me.

10 So the note is as follows: "Given the time of day,
11 5:10 p.m., the Court and parties want to know if you prefer to
12 continue to deliberate today. Please respond yes or no only.
13 If your answer is yes, do you want to order dinner? Yes or no.
14 If your answer is no, I will reconvene court shortly to recess
15 for the day. You will continue deliberating tomorrow morning.
16 Judge Gonzales."

17 So they circled no of whether to deliberate --
18 continue deliberating today, so the response is no. Okay.
19 With that, let's reconvene.

20 (Jury in at 5:19 p.m.)

21 THE COURT: Okay. Please be seated just for a
22 moment.

23 I received your response to the note that I sent back
24 to you asking whether you want to deliberate -- continue
25 deliberating this evening, and I received your response, and so

1 we will recess for the day. It's 5:20 in the evening. We will
2 reconvene tomorrow morning. Please be back in the deliberation
3 room by 8:30, and I will reconvene court with you and then
4 excuse you back to the deliberation room to continue your
5 deliberations. So that's the path forward.

6 Okay. Now, you're deliberating. My instructions to
7 you, as you have heard, is to deliberate but only in the
8 deliberation room when you are all assembled together. If you
9 happen to be in the deliberation room tomorrow morning and one
10 of you or two of you or any of you are missing, please do not
11 continue to deliberate. It will only be when you are all
12 assembled, all ten of you.

13 Okay. So those are my instructions. Thank you for
14 your work today. We're in recess. Have a good evening.

15 Please rise for the jury.

16 (Jury out at 5:20 p.m.)

17 THE COURT: Okay. So we're in recess.

18 Let me just note what I didn't note already. All
19 counsel are present.

20 All right. Anything, Mr. Villa?

21 MR. VILLA: Was the note signed by anybody?

22 THE COURT: It is not signed, but I will have the
23 note entered on to the record.

24 MR. VILLA: Sure.

25 THE COURT: That will be my instruction. But no,

1 it's not signed.

2 MR. VILLA: Based on the Court's instruction, you
3 want us here at 8:30, as well?

4 THE COURT: Yes, sir.

5 MR. VILLA: Yes. We'll see you tomorrow.

6 THE COURT: All right. Have a good night.

7 (Court stood in recess at 5:21 p.m.)
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C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Danna Schutte Everett, RPR, CCR, CRR, Official Court Reporter for the State of New Mexico, do hereby certify that the foregoing pages constitute a true transcript of proceedings had before the said Court held in the city of Albuquerque, New Mexico, in the matter therein stated.

In testimony whereof, I have hereunto set my hand on this 13th day of July, 2018.

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